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IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7416

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY,

Appellant

v.

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE No. 514, ET AL.,

Appellees

BRIEF AND APPENDIX ON BEHALF OF THE APPELLANT

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BRIEF ON BEHALF OF THE APPELLANT

This is an appeal from a judgment entered in the United States District Court for the Eastern District of Virginia, Norfolk Division, on February 8, 1957. By said judgment the District Court dissolved an injunction previously granted by the Circuit Court of the City of Norfolk, and subsequently extended as to time by said District Court.

THE CASE

The Norfolk and Portsmouth Belt Line Railroad Company, appellant, was the plaintiff in the suit. Hereafter it will be referred to as Belt Line or as the plaintiff.

Confronted on the afternoon of September 24, 1956, with notice of a general strike to become effective on September 26, 1956, the Belt Line filed its suit in the Circuit Court of the City of Norfolk seeking a temporary, and later a permanent, injunction against said strike.

The defendants named therein were the Brotherhood of Railroad Trainmen, Lodge No. 514, a voluntary association, Foy K. Vaughan, individually and as Local Chairman of such Brotherhood, the Brotherhood of Locomotive Engineers, Lodge No. 331, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and C. W. Mathews, individually and as General Chairman of the two Brotherhoods last mentioned.

The Brotherhood of Locomotive Engineers, Lodge No. 331, had, for some time prior to the institution of the suit, represented most of the engineers employed by the Belt Line. At or about the time that the suit was filed, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, became the representative of all the engineers, locomotive firemen and hostlers employed by the Belt Line.

When that fact developed, the Court announced, with the consent of the Belt Line, that the case would be dismissed as to the Brotherhood of Locomotive Engineers, Lodge No. 331, and that was actually accomplished in the judgment from which this appeal is taken, but there is no complaint about that.

The remaining two Brotherhoods, Foy K. Vaughan, individually and in his capacity as Chairman of his Lodge, and C. W. Mathews, individually and as Chairman of his Lodge, will be referred to, collectively, as the defendants. Said organizations and said individuals are sued individually and in their respective capacities as the repre-

sentatives of all the employees of the Belt Line engaged in train service.

Some letters were signed by other individuals on behalf of the defendants, and reference to letters written to and from said individuals are treated herein as letters written to and from the defendants.

At the instance of the defendants, the case was removed to the District Court.

The defendants moved to modifiy the injunction prior to a hearing and before their answer was filed. When the answer was filed, the Belt Line moved to strike out and suppress portions thereof.

In lieu of passing on the motions, the District Court ordered a prompt trial on the merits and it never did pass specifically on either of the motions mentioned. They are no longer material.

After the hearing on the merits and while the Court had the matter under consideration, the Court entered another order extending the injunction, which was about to expire according to its terms, until a final decision in the case.

The Court delivered a written opinion, which, by its order, was adopted as findings of fact and conclusions of law. On February 8, 1957, it entered the final judgment dissolving the injunction.

Immediately thereafter the Belt Line gave notice of an appeal, executed and filed its appeal bond, and moved the Court to suspend the execution of its order pending an appeal.

Thereafter, on the same day, the Court entered another order suspending the execution of its final judg-

ment and continuing the injunction in effect pending the outcome of this appeal.

Both in its opinion and in the order last mentioned, the District Court recognized the disastrous consequences which would follow a general strike by the defendants.

CONTENTIONS OF THE BELT LINE

The Belt Line takes serious exceptions to the District Court's findings of fact and conclusions of law, particularly the following:

1. The District Court found as a fact that the dispute between the parties does not involve a construction of an existing rule arrived at by collective bargaining, does not constitute a minor grievance, and is not a matter of which the First Division of the National Railroad Adjustment Board has jurisdiction.

2. The District Court failed to take cognizance of the fact that the controversy has now been submitted to and is now pending before the First Division of said National Railroad Adjustment Board.

3. The District Court found as a fact that the dispute between the parties arises over a negotiation for a new rule or agreement covering new and changed working conditions and terms of pay, and that the defendants have complied with the Railway Labor Act's requirements concerning the initiation and conduct of negotiations for such purpose.

4. The District Court found that the Belt Line has waived all right to additional notice in accordance with said Act.

5. The District Court found as a fact that the defendants have exhausted all administrative remedies required or permitted by said Act, and that the grievance is a major grievance.

Said Court, acting on its findings of fact, concluded as a matter of law that there is pending between the parties a major dispute concerning which the Adjustment Board has no jurisdiction; that the defendants have discharged all obligations required of them by law prior to calling and conducting a general strike, and they are now entitled to strike as a means of enforcing their demands.

The Belt Line avers that the Court's findings of fact, especially in the respects hereinabove set out, are without evidence to support them and are directly contrary to all the evidence in the case, and that the Court should have concluded as a matter of law that the dispute is minor; that the controversy is one of which the Adjustment Board has jurisdiction; that the defendants have not exhausted their remedies under the Railway Labor Act and, therefore, that the strike is illegal; and, further, that because the matter is now actually pending before the Adjustment Board no strike can be legally called and conducted until that Board decides the matter.

In addition to that, the Belt Line avers that even if the evidence justifies the District Court's finding that the parties were really negotiating concerning the adoption of a new rule or agreement, the defendants have not exhausted the administrative procedures required by the Railway Labor Act.

A strike, even in the case of a major grievance, is illegal unless such administrative procedures have been followed.

APPENDICES

This brief is followed by two appendices designated Appendix 1 and Appendix 2, respectively.

Appendix 1 is the one required by Rule 10 of this Court. Appendix 2 includes the pertinent correspondence, in chronological order, which is printed as a basis for the statement of facts and for the argument which follow.

THE FACTS

The District Court, in its opinion, has made rather an elaborate statement of the facts in which, though inaccurate in the respects mentioned, it describes generally the activities of the Belt Line, the proceedings that led to the controversy now existing and the proceedings that followed the controversy.

In these circumstances, our statement of facts may be very short and may be limited to point out features not covered by Judge Hoffman, features in which we disagree with him, and some of the features he mentioned which are repeated only to the extent deemed necessary to present the matter adequately on brief.

The parties are all subject to the Railroad Labor Act. The Belt Line's operations are entirely yard operations and all take place in a single district. It has a single seniority list and similar rates of pay for all employees engaged in train service.

Some of its employees engaged in train service live in Portsmouth and vicinity. Some live in Norfolk and vicinity. Others live in that section of Norfolk known as Berkley and in South Norfolk and vicinity. That portion of Norfolk and all of South Norfolk and vicinity may be referred to as Berkley.

Travel between Berkley and Port Norfolk and between Norfolk and Port Norfolk requires the use of toll facilities. There are no tolls between Norfolk and Berkley. The distance from Berkley to Sewells Point is approximately ten miles. All employees going from Portsmouth to Sewells Point must pass through Berkley and all persons going from Norfolk to Portsmouth must pass through Berkley.

At the time of the trial of this case eight employees who live in Norfolk were reporting for duty at Port Norfolk. Eight who live in Portsmouth were reporting at Sewells Point.

A strike, or work stoppage, "would cause irreparable damage to the carrier and to the public. It would substantially paralyze industry in the area involved." So said the Court. (App. p. 44). The rules governing the points for reporting for duty and being relieved from duty were adopted as the result of collective bargaining, and although there are three separate rules, the material part of each is paragraph (b), and that is identical in all three rules. It reads as follows:

> "The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that engine crews will report at the hump, others report at yard office, others at engine houses, or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will indicate a definite and recognized location."

Anticipating the Belt Line's intention to move some of its crews from Port Norfolk to Berkley Yard, the defendants protested against the change for reasons set forth in their letters of November 25, 1955, and February 13, 1956. (App. p. 63 and p. 67).

On February 13, 1956, they submitted the matter to the Mediation Board, which declined to take jurisdiction.

On April 26, 1956, the Belt Line gave notice that six of its thirty-four crews would be transferred from Port Norfolk to Berkley, effective May 2, 1956.

The defendants announced a strike and the Mediation Board proffered its services.

Mediation proceedings followed and were extended over several months, without result.

The Mediation Board, realizing that the controversy was not one within its jurisdiction, urged the parties to refer the matter to the First Division of the National Railroad Adjustment Board. The Belt Line agreed; the defendants refused.

Thereupon the Mediation Board terminated its efforts, and on September 24, 1956, the Belt Line posted new notices calling for the removal of five instead of six of its crews from Port Norfolk to Berkley.

The defendants gave notice of a strike, to become effective on September 26, 1956, and on September 24, 1956, the Belt Line applied to the Circuit Court of the City of Norfolk for an injunction, and it was granted by said Court.

After the trial of the case and while the District Court had the matter under consideration, the Belt Line submitted the controversy to the Adjustment Board ex parte. It is still pending before that Board.

There may be some question about whether this fact can be considered by this Court on this appeal. That will be mentioned later, but attention is called to the statement of the District Judge on that point. (App. p. 53).

There will be further references to the facts and to features of the Court's opinion in the argument.

ARGUMENT

The First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving train and yard service employees of carriers, that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen and yard service employees. 45 U. S. C. A. 153(h).

Disputes between a carrier and its employees growing out of grievances or out of the interpretation or application of agreement concerning rates of pay, rules or working conditions are to be handled in the usual manner, up to and including the chief operating officer of the carrier. If there is no agreement as a result of such handling, the matter may be referred by the parties, or either of them, to the Adjustment Board. 45 U. S. C. A. 153(i). Decisions of said Board are binding.

Major disputes, which include disagreements arising from attempts to negotiate an agreement or contract, must be handled on the property, but in the event of the failure to reach an agreement they must be referred to the National Mediation Board.

The jurisdiction of the two is different. The Adjustment Board can decide the controversy. The Mediation Board can only attempt to bring the parties into agreement.

Following the procedure set forth in the Railway Labor Act is compulsory. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 722; *Chicago River & Indiana R. R. Co.* v. *Brotherhood of Rrd. Trainmen, et al.*, (7th Cir.) 229 F. (2) 926; *Brotherhood of Rrd. Trainmen, et al.* v. *Chicago River & Indiana R. R. Co.*, _____U. S._____ decided March 25, 1957, and not reported.

In matters referable to the First Division of the Adjustment Board its primary jurisdiction is exclusive. *Alabaugh, et. al.* v. *B. & O. Ry. Co.* (4th Cir.) 222 F. (2) 861; *Sampsell* v. *B. & O. Ry. Co.* (4th Cir.) 235 F. (2) 569, and cases mentioned above.

In the Chicago River case, supra, the Supreme Court affirmed the Seventh Circuit Court of Appeals, which had enjoined a strike by the employees of the carrier over minor grievances. The controversy had been submitted to the Adjustment Board but had not been decided.

The Supreme Court said in the opening paragraph of its opinion:

> "* * *. The ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board."

Therefore, its opinion is unquestioned authority for the proposition that there can be no strike in such circumstances.

It is not clear from that opinion that a strike cannot be enjoined unless the matter is pending before the Board.

The same Court, however, made that perfectly clear in a two sentence opinion rendered on April 8, 1957, and not yet reported. *Manion* v. *Kansas City Terminal Rwy. Co.*, _____U. S._____.

That involved an appeal from a judgment of the Kansas City Court of Appeals enjoining a strike over minor grievances in a case which had not been submitted to the Adjustment Board. The Supreme Court, in its opinion, stated in the first sentence:

> "Judgment of the Kansas City, Missouri, Court of Appeals must be vacated in the light of our decis-

ion in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, No. 313, October Term, 1956, decided March 25, 1957, *because the dispute here is not pending before the National Railroad Adjustment Board.* * * *" (Italics supplied).

This makes it necessary to determine whether or not the fact that the controversy involved in the case at bar has been submitted to the Adjustment Board is officially in the record.

In paragraph 42 (Amended) of the complaint, the Belt Line specifically alleged that it had no grievance or complaint and, therefore, nothing to submit to the National Railroad Adjustment Board until the employees refused to comply with its order and definitely notified it of their intention to strike.

It set forth further that the time between the receipt of the strike notice on September 24, 1956, and the effective date of the strike, which was September 26, 1956, was so short that it was impossible to submit the matter to the Adjustment Board.

It alleged further that it intended to submit the matter to said Board at the earliest possible date.

Thereafter it became necessary to apply to the District Court to extend the injunction pending a decision of the case, because said injunction, by its terms was temporary and was about to expire.

At the same time said motion was made, the Court was advised that the matter had been submitted to the Board and counsel offered to file a copy of the submission. The Court remarked that such was unnecessary.

There was no reporter present and the foregoing matters do not appear in the record, but Judge Hoffman

mentioned the matter in his opinion (App. p. 53), where he said:

> "* * *. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction."

In view of this statement in the Court's opinion, we feel justified in outlining the facts mentioned above, although there is no official transcript thereof.

In these circumstances, if this Court considers that fact properly before it, then, following the Chicago River case, the judgment should be reversed and the strike should be enjoined.

If this Court does not consider that matter properly before it, then its decision will not dispose of the case and the Railroad Company will be free to have the question litigated again, either in a separate suit or in further proceedings in this case, upon remand. It should be finally litigated in this action.

In *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 203, the Supreme Court had occasion to deal with a situation somewhat analogous. There had been a change in circumstances since the decision in the District Court, but the right which enured to the appellant by reason of such change had not come into effect when the supplemental petition had been filed. Therefore, the Supreme Court held that the petition was premature as to so much of the relief as was based upon the changed circumstances. It said, however:

> "*The present action is an appropriate proceeding for the settlement of the entire rate controversy and the refund of such sums as may be determined, ultimately, to be due the Texas consumers.* Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper. *If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings.*" (Italics supplied).

In *Manion*, supra, the Supreme Court was even more specific.

Having vacated the judgment of the Court below in the first sentence of its opinion, it said in the second and final sentence thereof:

> "* * *. *The cause is remanded for further proceedings not inconsistent with this decision and without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time.*" (Italics supplied).

In the light of these authorities, we submit that if this Court should feel obliged to decide this case without considering that the matter is pending before the Adjustment Board, it should remand the case, with leave to the Belt Line to supplement its complaint by alleging the submission of the matter to the Adjustment Board and supplement its evidence by proving such submission, in order that the District Court may then pass upon the matter with the fact of submission in the record.

This brings us to the remaining feature of the case, namely: Was the controversy between the parties one in-

volving an interpretation of the rules, or a minior controversy subject to the jurisdiction of the Adjustment Board, or was it a major dispute arising over efforts to negotiate a new agreement, as found by the District Court?

If this Court holds that it was such a major dispute, then there is a further question, and that is whether or not the defendants have done all required of them by the Railway Labor Act as a condition precedent to a strike.

For his finding of fact, Judge Hoffman relied solely on the testimony offered at the trial by the witnesses Hayes and Mathews, which, in substance, was that the defendants conceded the right of the Belt Line to make the change in its operations, had never questioned that right, and that the negotiations had been concerned with the hardships incident to moving five crews from Port Norfolk to Berkley Yard. Those statements of the witnesses are contradicted beyond the peradventure of a doubt by their written protests, by their pleadings and by their actions. They are also contradicted twice by the actions of the Mediation Board, which declined to take jurisdiction of the matter when first submitted to it, but did proffer its services after the notice of strike.

After proffering its services, however, and after failing to bring the parties together, it wrote to the parties under date of July 30, 1956, and in its letter, it said:

> " 'The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.

> " 'The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3. Second of the Act, to consider and decide upon the differences between them." (App. pp. 72 and 73).

If the controversy was of the nature described by the witnesses in their verbal testimony, then the Mediation Board would have jurisdiction of the matter and further procedure was necessary, as will be pointed out hereafter.

The facts of the case, save as to the testimony mentioned, are shown in the written record and are not disputed. They are substantially similar to the facts in the case of *N. Y. Central R. R. Co.* v. *Brotherhood of Rail. Train.*, D. C. Ohio, 140 F. Supp. 273, in which the District Court held that the disputes involved were minor and involved questions properly cognizable by the Adjustment Board, and enjoined the strike.

The only difference in the facts is that in the New York Central case the Railroad Company transferred all its activity from one terminal to another, whereas in the case at bar the Belt Line transferred only five crews out of thirty-four.

The New York Central matter was first brought to the attention of the Mediation Board by a telegram identical in substance with the telegram sent that Board in this case, which will be mentioned hereafter, and the District Court called specific attention to the fact that no request was made in the application for a change in any existing working condition or for a new or supplemental agreement.

The Mediation Board declined to take jurisdiction until after the notice of the strike was given, and in that case also, it decided that the matter should be referred to the Adjustment Board and so advised the parties.

Coming back to the facts, we call attention to the correspondence and telegrams, to which we have added emphasis. The first communication on the subject between the parties was a letter from the defendants to the Belt Line dated November 25, 1955, (App. p. 63), in which they said:

1. It is the employees' position that Port Norfolk and Sewells Point have become firmly established as the two points where the Belt Line crews "*can be required to report for and be relieved from duty.*" (Italics supplied).

2. Any change in the present arrangement whereby the crews report and are relieved at Sewells Point will have to be made "*either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended.*"

That letter was written before the Belt Line had acquired a single Diesel locomotive.

On February 10, 1956, the President of the Belt Line conferred with representatives of the defendants in the President's office and delivered to them a written communication of that date. (App. p. 74). In that letter the President quoted the applicable rule and stated unequivocally that the Belt Line had the right to make the change under the existing agreement and that there were absolutely no restrictions on its right to do so and no requirement that such changes must be made either by mutual consent or in accordance with the Railway Labor Act. We quote two paragraphs of that letter:

" 'In view of the articles referred to above, *there is no restriction placed on this company which prevents*

it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended.

"'The articles referred to above are very specific in language and were intended for the purpose of permitting the company to change or add to the number of points at which its crews are to report and be relieved from duty, governed by local conditions.'" (Italics supplied). (App. p. 67).

The issue was made and the subject of controversy was clearly stated. The Belt Line contended that it had a right to make the change without the consent, without notice and without negotiation. The defendants specifically claimed that the change could not be made without their consent or as a result of negotiations under Section 6 of the Act.

If there were any doubt about the issue, all doubt was removed in the defendants' reply to that letter dated February 13, 1956, (App. pp. 66 and 67) in which they said, inter alia:

"'We doubtless erred in our previous letter when we referred to the contemplated change as simply a change in the *point* where crews are to report and be relieved. We should have called your attention to the fact that the change will amount to a *change* in *both the point and the locality at which these crews have traditionally reported and been relieved.*

"'A careful reading of the rules you have referred to, reveals that they refer to "*points*," ie, definite positions, and "*localities*," ie, areas or regions. We concede that the Company has a right under these rules to designate the point *within the area or region of Port Norfolk or Sewells Point Yards* where the em-

ployees we represent will be required to report and be relieved, so long as such designation does not work a hardship upon them, or result in a hazardous situation. *We deny, however, that the company has the right under these or any other rules to require these men to report and be relieved at Berkley Yard—a new locality far removed from Port Norfolk and Sewells Point, and of difficult access to the employees—without the benefit of agreements negotiated in accordance with the terms of the Railway Labor Act.* * * *." (Italics supplied.)

There were no other communications between the parties prior to the mediation proceedings.

On February 13, 1956, the defendants sent the Mediation Board the following telegram:

" 'Serious situation existing on Norfolk Portsmouth Belt Line Road as the result of management *arbitrarily moving the terminal from Port Norfolk to Berkley*, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows.'" (App. p. 39). (Italics supplied).

It should be noted by this Court, as it was by the District Court in the New York Central case, that there was no request for a change in any existing working agreement or for a new or supplemental agreement.

The Board, after advising the Belt Line of the telegram and receiving its version of the facts, considered the matter in executive session and determined that there was nothing which justified it in assuming jurisdiction. It so advised the parties in writing.

After the first strike notice was given on April 26, 1956, the Mediation Board proffered its services and there

were extended meetings and conferences, some in Norfolk under the jurisdiction of a mediator and one in Washington, D. C. under the direction of a member of the Mediation Board.

The details of the negotiations are not in evidence. They were expressly excluded from evidence by the ruling of the Court. Notwithstanding that fact the District Court found:

> "* * * it is abundantly clear that the general subject of discussion was the travel time and expense involved by reason of the proposed change. Whatever may have been the original intent of the Brotherhoods to insist that the change in reporting place could not be effected without their consent, this contention, if ever proposed, was quickly abandoned. * * *" (App. 1. 51).

How those facts could appear when they are not mentioned in the correspondence and the evidence was excluded is beyond us, and we respectfully submit that such a finding was directly contrary to the evidence.

During the mediation proceedings there were certain proposals made, first by one side and then by the other. Most of these were conveyed to the respective parties by the mediator or by the member of the Mediation Board. For details of the procedure, see testimony of Hayes. (App. p. 37). There were also several conferences among the parties but no settlement was reached.

After the Mediation Board terminated its activities in the matter, there was a single communication between the parties, namely, written notice from the defendants to the Belt Line on September 24, 1956, that the strike would commence on September 26, 1956.

We come now to the pleadings and we refer to paragraph 21 of the complaint. There we set forth that the defendants contended that the Belt Line had no right to make the contemplated change for two reasons: First, because Port Norfolk had been used for many years and that the Belt Line had no right to change it except by agreement with the defendants. Second, that the rules upon which the Belt Line relies for its authority to make the change, (ante, p. 7) really prohibit such a change except by consent.

If, as Hayes and Mathews testified, the defendants conceded the Belt Line's right to make the change, all they had to do was to say so, and the answer to that particular paragraph was an appropriate place in which to so state. They did not do so. In paragraph 13 of their answer they asserted that there were no allegations of fact in paragraph 21; that the plaintiff was only speculating as to the contentions of the defendants and that there was nothing requiring any answer, but by way of further answer, they asserted that the plaintiff has inaccurately stated their repeatedly announced position, which was set forth in paragraphs 6 and 10 of their answer.

Turning to paragraph 6, we find that the defendants again referred to the establishment of their homes (only some employees have established such homes) in Portsmouth, and then said that under the contract the Belt Line had the right to make changes in the points of going on and off duty *within the locations of Port Norfolk and Sewells Point*, but that the contract was silent on the right of the Belt Line to change the place or locality of reporting, and further, that such a change was a change in working conditions, which required notice pursuant to

Section 6 of the Act and negotiations. In other words, it required their consent.

The position taken in paragraph 6 is strikingly similar to that set forth in the defendants' letter of February 13, (ante pp. 16 and 17).

In paragraph 10, the defendants admit the right of the Belt Line to make all reasonable changes necessary for its operation *consistent with its contract with defendants and consistent with the provisions of the Railway Labor Act.* a reaffirmation of what is set forth in paragraph 6.

In paragraph 34 of the complaint the Belt Line alleged that the defendants should comply with the change orders (which cannot be disputed if they admit the right to make the change) and then, without interrupting commerce, process their claims.

We set forth three specific methods, any one of which could have been followed:

1st: They could file a complaint alleging violation of the collective bargaining agreement by changing the point for going on and off duty.

2nd: They could claim that the employees living in Portsmouth who might be required to go on and off duty at Berkley were entitled to compensation for the time spent in travel from Port Norfolk to Berkley and return and to reimbursement for the expenses incurred in such travel.

3rd: *That the defendants could request the Belt Line to agree to a new rule to provide for the payment of compensation to such parties because of the time and expense involved in traveling from Port Norfolk to Berkley for the performance of their duties and in returning.*

In paragraph 35 the Belt Line stated that if the defendents followed any of the methods suggested that negotiations would follow, and if unsatisfactory as to the first and second, could be taken to the Adjustment Board, and if unsatisfactory as to the third method, could be taken to the Mediation Board.

By suggesting the third method the Belt Line *expressly and clearly invited the defendants to initiate proceedings looking to the negotiating of a new rule or contract to provide for such compensation, and if that was what they were trying to do they had full opportunity to say so and to demonstrate it by their actions, namely, by giving notice under Section 6 of the Act and opening negotiations.*

Again they failed.

In paragraph 25 of their answer they *specifically denied the allegations in paragraph 34 of the complaint and specifically stated that they were not required to adopt or follow the procedure outlined in paragraph 34.* In said paragraph of said answer they did state that the issue involved was not covered by the existing contract, *but they do not explain why they refused to request the adoption of a new rule or a new agreement.*

So much for the words of the parties on the subject. Now we come to their actions.

If, in truth and in fact, they had admitted, prior to the trial, the right of the Belt Line to make the change under the existing contract and had admitted that the existing rule does not entitle them to any compensation by reason of such change, then they were in duty bound to comply with such change and to go to work at Berkley Yard.

There could be no hardships until they actually went to work there, and only by going to work could there be a determination that hardships were created.

It is by no means certain that there would have been any hardships.

It is certainly fair to assume that, had there been no action by the Brotherhoods to prevent the change, all residents of the Portsmouth area who were reporting at Sewells Point would have elected to report at Berkley Yard, thus saving themselves the expense and time involved in ten miles additional travel. Also, that all men living in the Norfolk area and reporting at Port Norfolk would have elected to report at Berkley Yard, thus saving themselves the expense and time from four and one-half to six miles travel and bridge toll or tunnel toll, and that all employees living in Norfolk at points nearer to Berkley Yard than to Sewells Point would have elected to report at Berkley Yard instead of at Sewells Point, thus saving themselves the expense and time involved in traveling a greater distance.

It might well have turned out that not a single resident of Portsmouth area would have to go to Berkley and all who reported there would have benefited rather than been hurt.

What do they claim was negotiated?

They say that they *negotiated hardships* or that they wanted to *negotiate hardships.*

Hardships may indicate the necessity or the desirability of negotiations looking to a relief or elimination of such hardships, but you can't "*negotiate hardships.*"

All negotiations in such matters result from a desire of the railroad involved or of the employees to do some-

thing *not permitted under existing rules and under agreements already negotiated.* Such party or parties may desire to change working conditions from those authorized or prescribed by the existing rules to others considered more favorable to the moving party. Employees might want to change working conditions, and what more frequently happens, the employees might think they are entitled to additional compensation for services being rendered. *In any of those cases the party or the parties desiring the change in conditions or the parties desiring increase in compensation must initiate the proceeding by making a request or a demand for such changes. Only thus can negotiations be initiated, and when initiated, the moving party must give the other party notice under Section 6 and request negotiations.*

In this case, there is absolutely not a word of evidence in the correspondence, the telegram, the pleadings or the testimony that the defendants have ever asked for or demanded any additional compensation. They have said, in substance, "You can't make this change without our consent or without agreeing to the changes in negotiations initiated in accordance with Section 6 of the Act." They have stopped right there and apparently thought there was some duty on the Belt Line to initiate negotiations for the increase in their compensation. This is a strange position, *especially in view of their present statement that the Belt Line had the right to make the change.*

If there had been negotiations for a new rule or a new agreement and such negotiations had failed, the Mediation Board would undoubtedly have jurisdiction, but it has twice denied its jurisdiction; once in refusing to docket the matter after considering it in executive session, following the receipt of defendants' telegram of February 13, 1956, and again in advising of the failing of negotiations in

their letter of July 30, 1956, wherein they called attention to the creation of the Adjustment Board "*with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.* (App. p. 72). (Italics supplied).

Negotiations of the kind mentioned must be initiated by notice in accordance with Section 6 of the Act. The District Court specifically found that such notice had not been given in this case, but, in effect, that it had been waived. (App. pp. 55 and 56). He relies on *McMullans v. Kansas, etc. Rwy. Co.*, (10 Cir.) 229 F. (2) 50. In the first place, we assert that there was no express waiver and there can be no waiver of a notice by implication, unless the party against whom such waiver is alleged has some information concerning the subject of negotiations.

Here the matter was not brought to its attention at all.

We also assert that the case cited does not even deal with a similar question. In that case, the material facts were as follows:

The B.L.F. & E. had been designated as the bargaining agent of the engineers, firemen and hostlers employed by the carrier. The agreement arrived at in negotiations with that organization provided that engineers should be retired upon attaining the age of seventy years.

The plaintiffs had reached that age and they objected to retirement. One of the plaintiffs was a member of the B.L.F. & E. and the other two were members of the B.L.E. They sought to enjoin the enforcement of that provision of the agreement which made it compulsory for

them to retire, and relied, in part, upon their allegation that said agreement was invalid because no notice of the negotiation was given to them individually and no such notice was given to the B.L.E.

The Court held that negotiations with the duly certified bargaining agent were proper and that a contract arrived at through such negotiations was binding and that there was no requirement for notice to the plaintiffs. Nothing said by the Court waived or in any way relaxed the requirements of Section 6.

In spite of that evidence, including the lack of any notice or demand on the part of the defendants, the District Court in our case found that the controversy was over the effort of the defendants to negotiate a change in existing agreements covering rates of pay, rules and working conditions, specifically with respect to alleged hardships resulting from the change of the reporting and relief point for five crews. The Court said:

> "* * * It is apparent that a supplemental agreement covering these alleged hardships was sought by the Brotherhoods. * * *" (App. p. 55).

If we assume for the sake of argument that the District Court was right in its findings of fact, we aver that the defendants have not taken all the steps required of them by the Railway Labor Act.

As to major disputes, the Act requires the parties to submit to the successive procedures designed to induce agreement. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 722.

After the failure of negotiations, the matter must be submitted to the Mediation Board. That was not done.

On February 13, 1956, the defendants referred the matter to the Mediation Board, but that was clearly in an effort to support their protest made to the Railroad Company at that time, and had nothing whatever to do with negotiations looking to a new contract.

Thereafter, the Board itself proffered its services under its emergency powers when a strike was threatened, but it is clear that the Board did not consider that as a submission of the major dispute. If it had done so, it would have been obliged to carry out all of the provisions of the Act, including Sections 5 and 10, (45 U. S. C. A. Sections 155 and 160). The final action required of the Mediation Board has not been taken under those sections.

Paragraph First of Section 5 says that if the efforts of the Board to bring about a settlement are unsuccessful that said Board "*shall at once endeavor as its final required action* (except as provided in paragraph third of this section and in Section 160 of this title) *to induce the parties to submit their controversy to arbitration* * * *." That has not been done.

Section 10 provides that if in the judgment of the Board the dispute threatens to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Until such final action is taken under those two sections, the proposed new agreement may not be made lawfully by either party and the defendants are not permitted to strike to require the change sought by them.

The failure to carry through such procedure deprives the President of any power to appoint an Emergency Board and

if such a Board were appointed the results obtained as a result of such intervention might be very different from the results achieved by the parties. Thus the public is deprived of one of the remedial procedures prescribed by the Railway Labor Act. Elgin, J. & E. R. Co. v. *Burley*, supra; *Virginian Ry.* v. *System*, 300 U. S. 515; *Graham* v. *B.L.F. & E.*, 338 U. S. 232.

With reference to arbitration, the District Court, in its opinion, (App. p. 52) says the record does not indicate that either party offered to arbitrate the matter, and (App. p. 59) he stated that neither party has requested arbitration and that the carrier has not exhausted its efforts to arbitrate the matter voluntarily. Apparently the Court was of the opinion that such failure was fatal to the Belt Line's case.

The Act does not require either party to suggest arbitration. It requires the Mediation Board, in the case of major disputes, to suggest it. However, in this case, the evidence disposes of that matter.

Hayes testified that the defendants had stated to the mediator that they were willing to arbitrate the issue, but stated very frankly that he did not know whether or not the mediator conveyed that information to the Belt Line.

On the other hand, White, of the Belt Line, testified, without contradiction:

> "We have not offered to arbitrate at any time. We have not been asked by the defendants to arbitrate. *There is no record in our entire proceedings where that question was put to us by the defendants or the National Mediation Board.*" (App. p. 18).

and further, that while the Board had jurisdiction of the matter there was never, at any time, any offer of arbitra-

tion made to him through the mediator from the defendants. (App. p. 19).

Finally, when asked whether the mediator communicated to him any offer from the defendants to arbitrate, he said:

> "*He did not. He consistently said they would not arbitrate; that they would not go to the mediation—I mean to the Adjustment Board or would not consider a special system board of adjustment.* * * *." (App. p. 26).

In 45 U. S. C. A. 157, it is expressly stated:

> "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

The District Court, in concluding that the controversy in this case should not go to the Adjustment Board, relied, in part, on the statement of counsel for the defendants that the time required for processing such matters frequently runs to four or five years, and, in part, on the rulings of that Board in several cases that the subjects of the claims were matters for negotiation. (App. pp. 52 and 53). He referred to three particular awards.

If the matter is one within the jurisdiction of said Board, then the time required for obtaining a decision is immaterial and irrelevant. That cannot defeat the jurisdiction of the Board any more than the delay incident to a crowded docket of a Court can defeat the jurisdiction of the Court in a case properly before it.

That the Board in the case mentioned held that the controversies were matters for negotiation is equally irrelevant.

An examination of the records in those cases will

show that the actions of the Board were proper and that the facts are in nowise similar to those in the case at bar.

The important thing is that the Board in every case to which the Judge referred, including those cited in his opinion, *held that it had jurisdiction.*

The present controversy having been submitted to said Board and the plaintiff being entitled to an injunction under the Chicago River case, supra, the actions of said Board in past cases are not of much assistance.

However, inasmuch as the Court referred to three specific cases, we would like for this Court to have the benefit of the facts, in order that it may evaluate the decisions.

Award No. 10603, Docket No. 15422. This involved a protest by the trainmen of the Central R. R. Co. of New Jersey against changing the designated point for going on and off duty from Elizabeth Port to the Standard Oil Plant at Bayway, New Jersey, a claim for two hours additional pay, a claim for reimbursement for expenses in getting to the new point, and a request that proper transportation be furnished by the Railroad Company.

The Railroad Company claimed that it had the right to make the change and that making the change did not entitle the trainmen to the benefits claimed by them; that such claims could arise only in negotiations for a new contract and that such negotiations were not subject to the Adjustment Board.

The Board held that the matter came before it on the question of the reasonableness of the designated points for going on and off duty, *the determination of which was a matter for negotiation.*

In other words, the effect of the decision is that the Railroad Company had a right to make the change; that making such change did not give rise to any claim, and

that the trainmen, if dissatisfied, must initiate negotiations in accordance with Section 6 of the Act.

Award No. 12035, Docket No. 15683. In this case, the Brotherhoods made a claim against the B. & O. R. R. Company for transportation for yard crews which, at that time, were being required to report for duty and to be relieved at Brooks Avenue instead of Lincoln Park, or that such crews be permitted to commence work and be relieved at Lincoln Park as theretofore.

The rule involved was similar to the rule in our case. Again the Board held, in effect, that under the rule the Railroad Company was within its right in making the change; that such gave no rise to these claims and, as in the other case, such matters were proper subjects for negotiation.

Award No. 14941, Docket No. 23829. This case appears to be in point. It involved the claim of an engineer named Rutherford and other employees for through freight rate of pay instead of yard engine rate allowed, and *a claim of compensation for thirty minutes used in going to work and thirty minutes coming from work on account of arbitrarily fixing a designated point of tie up without conference or agreement.*

Again, as in the other two cases, the Board denied the claim which, in effect, held that under the existing rule the Railroad Company had the right to make the change without any conference or consultation with the employees and that such did not entitle them to additional compensation. The Board also said that the request for additional compensation was a matter for negotiation.

Many other cases might be cited, but in the interest of time we will refer only to two.

Award No. 11460, Docket No. 12082. This involved a protest by employees of the Houston Belt & Terminal Ry. Company against the change of reporting point and claims for compensation for additional time used by the employees in going to and from the new reporting point. The claims were denied and the Board, in discussing the rule, which is substantially similar to ours, said:

> "If it had been the purpose of Article 13 to require the designation of McKinney Avenue as the exclusive place for crews to report on and off duty, suitable language to effect that purpose could have been employed.
>
> "The only exactions that Article imposes upon Carrier is that a place be designated; that it be adequate to keep lanterns, rain clothes and lunches of all regular crews, and that such crew be provided with a separate locker. Those requirements have been met."

Award No. 14260, Docket 22676. In this case the claim of the employees was sustained. The facts were not the same as ours. The employees in question, while required to report and be relieved at a given point, were, on the occasions giving rise to the claim, actually relieved at a point different from that at which they went on duty, having been ordered upon return to the original point to take the engine to another place. The Court properly held that the employees were entitled to compensation.

Various other cases were called to the attention of the District Court but it would unduly lengthen this brief to refer to all of them.

Again we call attention to the similarity between this case and New York Central, supra. The contentions between the parties in that case were almost identical in

principal with those in the case at bar, and the position of the railroad employees is well illustrated by the colloquy between counsel for the Brotherhoods in that case and the District Judge, appearing on pages 278 and 279 of 140 F. Supp. Counsel for the Brotherhood stated:

> "It is our position, Your Honor, that as to the authority of the railroad management to effect a physical change, namely, the closing of this yard, that this is a subject which the Brotherhoods have a legal right to negotiate with the management about, aside from these other questions."

Then said the Court:

> "If your theory would prevail here, then any time any railroad would want to make a change in its physical set-up and operation its directors would be required to sit down with the Brotherhoods, and come to an agreement on the propriety of that change; is that the position you are taking?"

The reply from counsel was: "Yes, Your Honor."

Confronted with overwhelming authority, the defendants at the trial realized that their position taken by them in their correspondence and in their pleadings could not be sustained. Then they undertook to "change horses" and to rely on their belated contention that they had never questioned the right of the railroad to make a change but had asked the railroad to negotiate concerning a new contract for additional compensation, without questioning the right of the railroad to make the change.

They had a perfect right to give notice of a desire for such a change in the agreement or for a new agreement and to require the Belt Line to negotiate with them, but such requests and such negotiations should have been separate and apart from their denial of the Belt Line to

make the change. To state the matter plainly, they should have accepted the invitation of the Belt Line to initiate such negotiations as set forth in paragraph 34 of the complaint.

CONCLUSION

On behalf of the Norfolk and Portsmouth Belt Line Railroad Company, we submit that:

1. The overwheliming weight of the testimony shows that the defendants contended from the beginning until the actual day of the trial that the Belt Line had no right to change the reporting place of crews from Port Norfolk to Berkley Yard except by mutual consent or as a result of negotiations. Obviously, doing it as a result of negotiations made the consent of the defendants essential. In support of this and in addition to what has been heretofore said, we call attention to one question put to the witness Hayes after he testified that the Railroad Company had the right to make the change and the answer to that question. (App. p. 36).

> "Q. And you contend and the Brotherhoods contends that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods providing for what you call the hardships, that is, the time consumed and the expenses; that is correct, isn't it?"
>
> "A. I didn't say that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done."

2. In spite of the spoken testimony of the witnesses Hayes and Mathews, which is contradicted by the cor-

respondence, the pleadings and the actions of the defendants, the true issue was whether or not, under the existing rule, the Belt Line had a right to require some of its crews to report at Berkley Yard rather than at Port Norfolk without the consent of the defendants, and the determination of that issue is solely and exclusively within the jurisdiction of the First Division of the Adjustment Board.

3. Never, at any time, have the defendants notified the Belt Line, expressly or impliedly, of a desire to negotiate a new rule or agreement independent of their denial of the Belt Line's right to make the change.

4. The issue has been submitted to the Adjustment Board and is now pending before it.

Therefore, the judgment of the District Court should be reversed and the strike should be permanently enjoined.

Respectfully submitted,

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ROBERT THOMAS BOWEN, SWORN (Tr. P. 52)

DIRECTION EXAMINATION BY MR. WILLCOX:

Q. What is your name, sir?

A. Robert Thomas Bowen.

Q. And you are assistant to the chief engineer of the Norfolk and Portsmouth Belt Line Railroad Company, are you not?

A. Yes, sir.

Q. Explain to the Court—I assume the Court already knows it but I want it for the record—the routes available for transportation between Port Norfolk, the yard of the Belt Line known as Port Norfolk, and the yard of the Belt Line known as Berkley Yard, and give the distances.

A. Well, I will have to refer to my notes. At the time that I took them, on March 6th, I made a trip from the Port Norfolk yard office through the tunnel to the Berkley yard office, which was a distance of four and one-half miles.

THE COURT: That is by automobile?

THE WITNESS: Yes, sir, that is by automobile.

Q. That is measured by automobile speedometer?

A. That is right, yes, sir. And then in return I made the trip by the Jordan Bridge from the Berkley Yard office to the Port Norfolk Yard office, which was six and one-tenths miles. And then on July 18th I made a trip from the Port Norfolk Yard office by way of the free toll route by Smith-Douglass, which was a distance of twelve and three-tenths miles.

Q. The last route that you mentioned is the only one which can be followed that involves no tolls?

A. That is right, yes, sir.

Q. Do you know what the toll is on the bridge, the second route that you described?

A. On the Jordan Bridge, I don't know if there are any reduced rates if you buy a book of tickets or not, but round-trip is 35 cents for car and driver.

Q. Extra for the additional passengers?

A. That is right; five cents extra for an additional passenger.

Q. That is round-trip?

A. That is right; 35 cents round-trip, car and driver, plus 5 cents for each additional passenger.

Q. What is the tunnel fare?

A. The tunnel fare is 30 cents one way for car and driver.

Q. And 5 cents additional each passenger?

A. That is right, yes, sir.

HARRY L. WHITE, JR., SWORN (Tr. P. 55)

DIRECT EXAMINATION BY MR. WILLCOX:

Q. State your name and occupation.

A. Harry L. White, Jr.; president and general manager of Norfolk and Portsmouth Belt Line Railroad Company.

Q. Mr. White, have the defendants or any of them submitted to the Belt Line any claims or complained of any grievances they may have in regard to this change in operations save as to their contention that we cannot make the change except as a result of negotiations with them?

A. No, sir.

Q. Has any representative or representatives of the Belt Line conferred with the employees and the representatives of the Brotherhood on this subject?

A. Yes, sir.

Q. On how many different occasions, do you know?

A. I should say at least, including those conferences with the mediator, four; three conferences with the mediator and a private conference in my office at my request.

Q. Those conferences take place in Norfolk?

A. Those did, and in addition to that we had a meeting in Washington on the 23rd of July with the Mediation Board.

Q. During those conferences did you or did you not give consideration to every proposal made or suggested on behalf of the Brotherhoods and their members?

A. I did.

Q. Did you ever refuse to negotiate with them at any time on any subject?

A. Up until the time I received their letter of February 13th, I believe it was, we had no negotiations.

Q. But I am talking about after that. There had been no negotiations. But during the time the matter was in the hands of the Mediation Board and we were having these conferences, did you or not discuss and confer on this subject at all times when you were requested to do so?

A. Yes, sir, but I never had a request to discuss it.

Q. Where did your request come from?

A. Through the Mediation Board.

MR. WILLCOX: Now, I will have to anticipate the answer of what is coming, your Honor, if I may, in regard to the answer.

Q. Has anybody at any time ever submitted to the Belt Line directly or indirectly an offer to arbitrate the controversy?

A. No, sir.

Q. Have you with you the letter received from the Mediation Board, the final letter before it terminated its efforts?

A. Yes, sir.

Q. Will you produce that, please, and your reply also if you have it.

MR. MACMILLAN: Mr. Willcox, if it will save you time, I believe you set it out in your complaint and we will admit the letter as it appeared in the complaint is correct.

MR. WILLCOX: I did not set out the letter from the Mediation Board. I set out a portion of the reply.

If your Honor please, I offer in evidence a copy we have the original here of the letter of July 30th from the Mediation Board, which I would like to introduce.

THE COURT: Letter of July 30th, 1956, from Mediation Board to the Belt Line Railroad.

MR. WILLCOX: And to the Brotherhoods.

THE COURT: And to the Brotherhoods.

MR. WILLCOX: And ask that be marked as Complainant's exhibit.

THE COURT: Complainant's Exhibit No. 1.

(Received in evidence and marked Plaintiff's Exhibit No. 1.)

MR. WILLCOX: If your Honor please, I am not going to read the whole of this letter now but I would like to read part of it. After reciting what had taken place before the Board, they say this:

"In view of this action of the Carrier," —that was in declining to agree to a suggestion— "copies of the proposed agreement, executed by the organizations' representatives and now held in escrow by the undersigned, are being destroyed in accordance with Board Member Edwards' letter to Messrs. Turner, Mellett and Jenkins of July 24, 1956.

"*The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretation or application of agreements concerning rates of pay, rules or working conditions.*

"*The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3, Second of the Act, to consider and decide upon the differences between them.*

"The National Mediation Board stands ready to render what further assistance may be necessary if

the parties agree to this procedure. A prompt reply is requested."

Q. Now, you replied to this letter, did you not, Mr. White?

A. Yes, sir.

Q. And in that letter you included the paragraphs, in response to the Board's suggestion, which are set forth in paragraph 26 of the complaint?

A. Yes, sir.

MR. WILLCOX: And I understand that is admitted?

MR. MACMILLAN: Yes.

THE COURT: The reply of Mr. White, then, appears in paragraph 26 of the complaint filed in this action.

MR. WILLCOX: The reply to that particular portion. It will be necessary, sir, to bring in the whole letter if your Honor hears evidence on the matters we asked to be stricken out today.

Q. Mr. White, in the negotiations up there

MR. MACMILLAN: Mr. Willcox, do I understand you are not going to introduce the letter you read from?

MR. WILLCOX: I understood you admit that. Not at this time.

MR. MACMILLAN: We ask that it be admitted and that the whole letter be read and not the portions of it.

MR. WILLCOX: If your Honor please, the only reason I object to it: I have moved to strike out certain portions of the answer in which they set forth proposals and counter-proposals, and this deals with those. Subject to that objection, I haven't the slightest objection in the world of introducing the whole letter. But I want it understood I am introducing it now only for the purpose of introducing the

reply to that suggestion. I still claim that it is inadmissible.

THE COURT: I understand. I will let Mr. MacMillan introduce it subject to your objection at the proper time.

MR. WILLCOX: He can do it now.

THE COURT: All right. Let it be marked as Defendant's Exhibit No. 1.

(Marked Defendant's Exhibit No. 1.)

MR. MACMILLAN: Your Honor, our position is, if you read from a part of the letter you have got to read the whole letter to get it in context. We don't object to Mr. Willcox putting in a part. We merely ask that it all be available to the Court.

THE COURT: It is all in now subject to the objection of Mr. Willcox to the part he has moved to strike out.

(Mr. Willcox then read letter marked Defendant's Exhibit No. 1).

MR. WILLCOX: Now, that letter was written to the Board in response to its letter. It does not appear here but copies were sent to the organization.

MR. MACMILLAN: We object to the admission of that as a self-serving statement on the part of complaintant.

MR. WILLCOX: He offered it, your Honor.

THE COURT: You asked for the whole letter, Mr. MacMillan.

MR. MACMILLAN: My understanding was that he sought to introduce a letter which is the letter of July 30th, 1956, written by the Mediation Board to Mr. White. That is the letter which I asked to be marked.

THE COURT: No. That was introduced before as Complainant's Exhibit No. 1. That is the one which Mr. Willcox told you was not in the complaint.

MR. MILLAN: This letter was not shown to me. I hadn't seen it until just now. We object to the admission of that on the grounds that it is not binding on these defendants.

THE COURT: We are going to let it in.

MR. MACMILLAN: We save our objection.

THE COURT: Certainly, if your contention is right that the other evidence comes in from the Mediation Board, the whole letters that Mr. Willcox is now objecting to, and I think that it is probably admissible for the purpose of showing the whole transaction, I am inclined to believe that it is admissible. Of course, this also deals with certain self-serving statements, but it is a matter of the permanent records of the Belt Line Railroad, is it not?

MR. MACMILLAN: Well, the evidence we offered was evidence which both parties had participated in before the board. This evidence is a letter between one party to the board, which was not received by the other party nor did the other party have any part.

THE COURT: Suppose the other party had re-received it, what could you do about it? You couldn't have stopped it in transit.

MR. MACMILLAN: No, as I say, we might have then been a party to it and we might have written a letter in reply to it raising some objection.

THE COURT: It may be self-serving. It may well be self-serving, but in order for me to have the history of what went on, I have got to have all the facts. That is why I am inclined to believe that ultimately I am going to rule against Mr. Willcox on certain of his motion to strike out paragraph 11.

MR. WILLCOX: If your Honor please, bear in mind I offered only the part quoted here and my friend insisted on it.

THE COURT: That is true. It has been marked as a Defendant's exhibit.

MR. WILLCOX: That is correct.

Mr. MacMillan, you have admitted paragraph 27. I take it that includes the telegram?

MR. MACMILLAN: That is correct.

Q. (By Mr. Willcox) Now, Mr. White, when jobs are open and bids are requested and no bids come, what is the procedure for filling the jobs?

A. Well, the junior man on the seniority roster is assigned to the job. I think Mr. Burrows, the superintendent, could probably give you more accurate detail of that particular question, if it's permissible; because he lives with it and he handles all those bulletins and routine matters dealing with the operation.

Q. During the months starting last November when you received the first letter from the Brotherhoods and down to the present, what complaint have the men made and how many complaints have they made about this change? I don't mean how many times they have made the same complaints, but have they ever made any complaint except they had to be negotiated with?

A. No, sir.

Q. What is a method of handling grievances or complaints in connection with rules, working conditions and so forth which are submitted by the employees?

A. Well, ordinarily those complaints, speaking of the transportation department, are filed with Mr. S. G. Burrows, superintendent. That is the first or initial step. They present time claims or grievances requesting conference to discuss the grievance or rule violations and so forth. And after conferences with him, if they are not settled, they frequently and have on occasion appealed Mr. Burrows' decision, if he didn't agree with them, to me as being the highest officer of the company authorized

to settle disputes. And they usually write in and request a conference.

Q. I don't think you need to go in any detail. Are you the highest officer of the company authorized to deal with such things?

A. Yes, sir.

Q. And if your decision is adverse, then they have a right of appeal to the Adjustment Board?

A. Yes, sir.

Q. How many seniority districts are there on the Belt Line?

A. One.

Q. Does that then include all the employees who are members of the Brotherhoods and who are represented by them?

A. Yes, sir.

Q. All on the same list and regardless of which point they work from or work to, they are all in the same district?

A. Yes, sir.

Q. And is that or not that a yard or switching district or is it a line?

A. It's all a switching terminal railroad. All considered in the same switching district and same tariff rates apply and there is no difference between one part of the railroad or another as far as employment or seniority goes.

Q. That applies not only to selection of men but also to the rates of pay and the duties?

A. Yes, sir.

Q. Mr. White, have you got the information, or Mr. Burrows got it, about the numbers of employees that would be affected by this strike?

A. I have that information.

Q. Will you give the Court the total number of employees and the number who will be affected by the strike and the number who will have to be laid off as a result of the strike although they are not members of the Brotherhoods.

A. I have this information here. I thought I had that information, Mr. Willcox.

THE COURT: Perhaps if Mr. White can't locate it, we can let it come in later.

You can locate it at supper time, Mr. White.

THE WITNESS: All right, sir. There were 172 employees and three organizations, including one—who still would be affected; that is, if they all went on a strike, would go on a strike. I think there's about 133 M. W. and S., maintenance and way structures, mechanical, and general office employees, assuming that the railroad ceased to function.

Q. With the men on strike, these Brotherhoods on strike, could you function?

A. No, sir.

Q. And would or would not the result be in laying off all those other men?

A. Yes, sir, they would be laid off.

MR. MACMILLAN: Your Honor, I couldn't hear those totals over here.

THE COURT: I think he said 172 originally, did you not?

THE WITNESS: Yes, sir, and about 133, I believe is the figure, but I can verify that.

THE COURT: Those are the approximate figures?

THE WITNESS: Yes, sir.

THE COURT: One hundred seventy-two plus 133?

THE WITNESS: Yes, sir; a little over 300.

(Then, at 5:25 p. m. a recess was taken until 7:30 p. m.)

EVENING SESSION

(The Court reconvened at 7:30 o'clock p. m.)

MR. WILLCOX: If your Honor please, we want to introduce as an exhibit a map showing the Belt Line, which contains in the corner a printed index to

the industries which is out of date, and with it we have attached an up-to-date index of the industries. I can put a witness on to prove it if there is any argument about it, but I don't think there is.

Any objection?

MR. MACMILLAN: No objection to the map. They are looking at this list.

THE COURT: Let the map be marked Complainant's Exhibit 2 and the attached list when it has been served by the proper parties be marked Complainant's Exhibit 2-A.

(Map received in evidence and marked Plaintiff's Exhibit No. 2.)

MR. WILLCOX: If your Honor please, there is on the map, I am quite sure your Honor has seen it, an index to the industries, which was the index when the map was made. That has changed with the addition of new industries and elimination of old and the typed list is nothing but a substitute for the printed index.

THE COURT: I understand.

MR. WILLCOX: Any objection to it, Mr. MacMillan?

MR. MACMILLAN: I have heard none yet. They have got to about page 6.

THE COURT: Suppose while the gentlemen are examining that, Mr. Willcox—because Mr. MacMillan is apparently not too interested in that—Mr. White was on the stand.

MR. WILLCOX: That concludes our examination of Mr. White.

MR. MACMILLAN: I have a few questions.

HARRY L. WHITE, JR., the witness on the stand at recess, resumed the stand and further testified as follows:

CROSS-EXAMINATION BY MR. MACMILLAN:

Q. Mr. White, in response to Mr. Willcox's question, you stated that you at all times were prepared and willing to negotiate this matter, is that correct?

A. Not to begin with, because we had no request for negotiations. We had no requests for a conference to negotiate. Never have had a request for a conference to negotiate.

Q. When you had that first conference on February 10th you gave them a letter at that time, did you not, in which you stated that you wanted it understood that that conference was not a negotiation?

A. That conference was held at my request during Mr. Burrows, the superintendent's, absence, at which time I requested Mr. J. L. Jones, the train master, to invite these gentlemen over to discuss the thing so that I could find out something about what they had in mind. The only letter that I had gotten up to that time was the one dated November 25th, which simply asserted their position as the letter shows. So this was a gesture on the part of the management to try to find out what the complaint was, so that we could further consider the whole thing, and it was a gentlemen's agreement that that letter and the conference would not be used in connection with any of the negotiations if they took place. It was not intended, and I so stated in the letter, and I am sure these gentlemen if they were there would confirm the understanding.

Q. You stated at that time that you were not willing to negotiate on February 10th and set it forth in the letter, did you not?

A. I said that conference was not for the purpose of negotiation. I had never refused to negotiate. I had never had a request to negotiate.

Q. Thereafter, after the Mediation Board got into it, you did negotiate, did you not?

A. Through the mediation proceedings, we negotiated.

Q. In the course of those negotiations did not proposals pass back and forth between the parties, one from the carrier and one from the defendants?

MR. WILLCOX: If your Honor please—Well, I have no objection to that question. That can be answered yes or no.

A. I would like to have that question restated.

(The last question was read by the reporter.)

A. That is correct; through the mediator. We had no direct conference with the organizations during any mediation case as such. I think on two occasions there was a joint conference held at the request of the mediator.

Q. I wonder if you would examine that document and tell us whether that is a copy of a proposal made by the complainant as a settlement of the issue.

A. I wouldn't say it was as a settlement of the issue. I would have to check my file to see if this is a copy.

Q. I wish you would.

MR. WILLCOX: If your Honor please, while he is checking it, this brings up the question I raised in my motion to strike. They are proposals and we may assume for the same of this argument that they are copies submitted for consideration in an effort to compromise, through the Mediation Board and under the supervision of the Mediation Board. All of them are efforts to reach a compromise and are therefore privileged and inadmissible and cannot be evidence of any admission or obligation to make any compensation. They are all under the direction and sanction of the Board and they are understood to be without prejudice and are privileged.

THE COURT: Well, I might say this, Mr. Willcox, that whether the carrier made any proposal or whether the Brotherhoods made any proposal would not affect me one iota. I can assure you of that. Now, I can understand in all negotiations, even in these trifling lawsuits that we have sometimes that

aren't worth $25, sometimes they are negotiated and settled for what we call nuisance value, $100 to $150. If there were a jury involved here, I think unquestionably it would be of vital importance. I don't see where it makes a whole lot of difference as to the details of the compromise or proposed compromises of the matters. I am more interested in establishing whether or not there have been negotiations which may or may not have complied with the requirements that are imposed before a strike can be called. I assume that is what Mr. MacMallan is trying to prove. Now, if he wants to just prove that Belt Line has made an offer and the Brotherhoods made an offer and the details of those offers, frankly, I am not interested in those at all.

MR. MACMILLAN: Nor do we offer them for that purpose, your Honor. Mr. Willcox is free to strike out any portion of the contents of those proposals. We offer them merely as proposals, as evidence of negotiation and as evidence of compliance with the Act.

MR. WILLCOX: If I am free to strike out any part of them, I will strike out all of them. I will accept your proposition. Your Honor says they will not make any impression upon you, and I am sure that that is correct, and that in itself seems to me to be conclusive that they ought not to be admitted because we don't know who is going to pass on this after your Honor does and whether they will have the same impression you do. But it is already stipulated in the admissions concerning the allegations that there were negotiations, that those proposals were offered and rejected. And the witness himself has just testified that proposals were made and rejected. Now introducing the letter with a written proposal isn't necessary to prove something that is stipulated and to which the witness has already testified and which may later prove to be prejudicial.

THE COURT: Well, the only thing that I can comment on that is that Mr. White did testify on direct examination that no complaints or grievances had been submitted to him. Now, that may be correct. However, would not a proposal by the Brotherhood in effect constitute a complaint in the course of negotiations? That is what I am talking about.

MR. WILLCOX: A proposal made through the Mediation Board in an effort to compromise would not in my humble opinion be a complaint. Your Honor, we have in the record the facts. We have it through his testimony and by stipulation and admission that there were negotiations, that the board called us into session, proffered its service, and that they did negotiate and that offers were submitted and counter-offers were submitted—I may vary the words, too much details or too little—and rejected. There never was any agreement. So to prove that Mr. White offered this proposition and the Brotherhood offered that proposition is nothing but giving the details of the offer and cannot be admissible for anything in the world unless the Court can say they admit they are liable for something, here is the admission because they made an offer.

THE COURT: I can assure you as far as I am concerned it would not faze me one iota. You may be right when you get into another court, either side; and I assume some other court will ultimately determine the final question, in any event, and it might have some effect on some other court.

But, Mr. MacMillan, you have stated that you do not want the details of the proposals. If Mr. Willcox has conceded for the record that through the Mediation Board or the individual mediator proposals did pass, one from the carrier, one from the Brotherhood, which ultimately I assume were rejected by one or the other, what else would you want to prove by the letter that you have exhibited to Mr. White?

MR. MACMILLAN: Not a thing, your Honor. If it would be stipulated that written proposals flowed back and forth between the parties, the details of those writings are of small consequence. *And I want to make it clear we do not contend that Mr. Willcox has been bound, prejudiced, or in any way precluded by anything that happened during mediation. We are trying to present to the Court a full and complete picture of what did happen and how far the parties did go in negotiation.* (Italics supplied.)

THE COURT: You have said that proposals flowed, and I emphasize the use of the word "flowed." Do I understand that according to your contention one proposals came from the carrier and one proposal came from the Brotherhoods, and that they went through the Mediation Board and were rejected?

MR. WILLCOX: More than one, your Honor.

THE COURT: More than one?

MR. MACMILLAN: Several.

THE COURT: Several proposals? From both sides?

MR. MACMILLAN: And they were in writing and went back and forth.

THE COURT: Mr. Willcox, are you willing to stipulate to that?

MR. WILLCOX: Yes, sir; I have alleged it, that various propositions were made.

Is your Honor familiar with the procedure of the Mediation Board?

THE COURT: I am generally familiar with it, Mr. Willcox.

MR. WILLCOX: Have you ever been through one?

THE COURT: Once.

MR. WILLCOX: May I make this a brief statement of it. You would think when you get the Mediation Board that you would sit down and confer and discuss the thing. They don't do that. When we went into Washington—

MR. MACMILLAN: Your Honor, I object to counsel's statement as to what happened when he went to Washington.

MR. WILLCOX: I am just going to tell you the procedure. We went in and met Mr. Thompson, the executive secretary, and he says to the employees—

MR. MACMILLAN: Your Honor, I renew my objection.

MR. WILLCOX: "Go on to the library."

THE COURT: Mr. Willcox, you can't testify.

MR. WILLCOX: If your Honor is interested in the procedure, I can prove it by Mr. White.

THE COURT: If you prove it by Mr. White, just don't go ahead and open the door so Mr. MacMillan can get these letters in you are so vigorously objecting to. I have sustained the objection now to the letter by reason of the stipulation entered into between counsel.

Q. (By Mr. MacMillan) Mr. White, on what day and at what place did you offere to arbitrate this matter with the defendants?

A. We have not offered to arbitrate at any time. We have not been asked by the defendants to arbitrate. There is no record in our entire proceedings where that question was put to us by the defendants or the National Mediation Board.

Q. In other words, at no time was communicated to you through the mediator any offer of arbitration on the part of the defendant?

A. As Mr. Willcox started to tell you—

Q. If you will just answer my question. During the course of mediation, while the National Mediation Board had jurisdiction of the matter, was at any time any offer of arbitration made to you through the mediator from the defendants?

A. There was not but I would like to qualify that by saying this: that the mediator would go over to the organizations and—

Q. Mr. White, I am not interested in procedure. Mr. Willcox is going to give you a chance to go into that at length.

A. All right.

Q. Mr. White, do you know at what year or what date the Port Norfolk place of reporting or the yard was commenced?

A. I think it was around 1897 or 1898. That is when the operation of the Belt Line was officially started.

Q. And at approximately what date did Sewells Point place or yard commence?

MR. WILLCOX: That is all stipulated, your Honor.

A. The records, according to Mr. Willcox's figures, show around 1916 or '17. I know there were locomotives running in that vicinity at that time but whether they had a terminal established or not, I don't know. I have been there thirty years but that was before my day.

Q. In 1941 and '42, Mr. White, you were not president of the railroad, were you?

A. No, sir; I was vice-president and general manager.

Q. At that time did not the complainant open a place of reporting or a yard at Money Point?

A. It opened a place of reporting; not a yard. No tracks were built. It was simply for the seasonal operation of an extra crew down there because of congested conditions during what we call the fertilizer season.

Q. Now, in the course of that, I believe claims were prepared and filed with the railroad, were they not?

A. That is correct.

Q. Do you recall being present at a conversation in the presence of Mr. Mathews, a defendant in this proceeding, Mr. Joe Lavine, Mr. O. K. Hedges, Mr. Robert Early, and a Mr. Crawford, in which the defendants advised you that they were abandoning those claims because they could not properly be submitted to the Adjustment Board?

A. I don't recall that instance. I know that at the time that terminal—that is, the reporting point was established for the one crew, that the former president, Mr. M. S. Hawkins, handled the case, and there is a letter in the record here that he wrote to two of the grand chief officers, or Grand Lodge officers, in connection with those time claims. I have a copy of it here. And the claims were not progressed. I did not handle that at the time.

Q. Then the yard—or rather, that reporting place was abandoned in '42, was it not?

A. Well, it was discontinued after the fertilizer season, when the crew was not needed for continuous operation. Now, whether—It wasn't abandoned in the sense it was eliminated. I don't recall now just whether the following year it was put back or not.

Q. And thereafter, the men have been paid for, or rather, furnished transportation and have been transported on claimant's time when they have reported at Money Point?

A. At what we call the Smith-Douglass, or with the Smith-Douglass crew. I think Mr. Willcox explained to the Court this morning that the Ford operations and the —what we call the Smith-Douglass or Money Point operations, which in effect is that we, in order to keep those two areas in operation, we transport the men in our station wagon on the company's time and one crew is relieved by the other. They are seasonal and only one crew is involved.

Q. Now, prior to your notice which was effective September 25th, changing the place of reporting from Port Norfolk to Berkley, what was the practice of the complainant as to transporting men from Port Norfolk to Berkley when they would have occasion to be on what

you call a trick, to do the second trick—isn't that what you call it?

A. Well, that wasn't involved as far as I know, except at the Ford plant when we were operating over there.

Q. I am talking about Berkley.

A. Well, all crews operating out of Port Norfolk and reported back to Port Norfolk. There was no occasion for transporting the men.

Q. You mean there never was occasion for having men transported by company vehicle on company time to Port Berkley?

A. That is right.

Q. Never was such occasion?

A. There might be if an engine broke down or something like that. But there was no set program.

Q. Now for the purpose of clarification, Mr. White, some of the details here, you acknowledged the receipt of the letter dated November 25th, 1955, from these defendants to the complainant?

A. Yes, sir.

Q. You acknowledged the letter dated February 10th, 1956, which you, yourself—or rather, the complainant wrote the defendants, February 10th, that was the letter that was delivered to them at the conference?

A. That is the one I delivered to them at the conference.

Q. You acknowledged receipt of the letter dated February 13, 1956, which was a letter from the defendants to the complainant?

A. Well, I will have to get my file to check that.

Q. Let me show it to you in the answer. I think you will recognize (handing). I merely want you to acknowledge whether you received that letter.

A. What is the date of it?

Q. February 13th.

A. It don't show. Oh, I see.

Q. It was addressed to you and was from the Brotherhood.

A. That is the letter I received. I think I can check in my file.

THE COURT: That is in paragraph what, Mr. MacMillan?

MR. MACMILLAN: Paragraph 11 (c) of the defendant's answer.

Q. Mr. White, you received from the Mediation Board the copy of the proposal of settlement set forth in paragrah 11 (h) of the answer, did you not?

MR. WILLCOX: Now, if your Honor pleases, the same question. The only difference is this was one submitted by the Board itself in the same conference in Washington.

THE COURT: This, though, he has only asked Mr. White whether or not he received the letter.

MR. MACMILLAN: Received the contract, your Honor—I mean the agreement, the proposal.

THE COURT: Received the proposed agreement, which of course is not binding on the Belt Line. It just goes to further substantiate the fact that there were proposals that went back and forth. I think probably your point may be well taken as to the contents of these letters and Mr. MacMillan has conceded that the contents are not material. But if he wants to further supplement this stipulation that the proposals did go back and forth, I don't see where there is any harm whether Mr. White acknowledges that he did receive such a letter.

THE WITNESS: Judge, may I get my file on this?

THE COURT: Yes, indeed.

Let the record indicate that there is no objection to Complainant's 2-A, which is the list of industries that is referred to and should be attached to Complainant's Exhibit 2 which is the map.

(List received in evidence and marked Plaintiff's Exhibit No. 2-A.)

THE COURT: Show Mr. White the letter that you have reference to.

Q. (By Mr. MacMillan) Mr. White, I make reference to the Mediation Board agreement set forth in defendant's answer, 11 (h), which purports to be an agreement or proposal for agreement signed by the various defendants and by the mediator but not signed by the railroad, and I ask you whether that proposal was transmitted to you by the mediator subsequent to July 23rd, 1956.

A. No, sir. The history of that is that at the mediation meeting in Washington on the 23rd of July, Mr. Leverett Edwards, one of the mediators, after discussing the various proposals with the organizations and the company's representatives, in the late afternoon he had what he thought was an acceptable agreement, or a proposal. *It was not an agreement. It was not a tentative agreement. It was simply something that he had written himself in an effort to settle the case.* Now, I have here a mimeographed sheet which he handed me during that conference. It's headed "National Mediation Board, Mediation Agreement, NMB Case E-29." I think it's a duplicate of what you have. Then attachment to mediation agreement is the so-called proposal.

Q. My question is: You did receive that?

A. I received that.

Q. And rejected it?

A. No, sir, it was not submitted as an agreement. It was submitted as a proposal.

Q. I say, and did you reject the proposal?

A. Let me finish, please.

Q. Excuse me.

A. I told the Mr. Edwards, and the conference, that we had to have time; the management of the company had to have time to consider this proposal. It was pre-stated that when we went in there for the joint conference *that this was not an agreement; it was simply a proposal prepared by Mr. Edwards and was for consideration by both parties.* This agreement that you have here, which is signed, was signed the next day, according

to the record. Mr. Willcox, general counsel, Mr. Burrows, the superintendent, and I, with the permission of Mr. Edwards, came back to Norfolk on the Washington boat that night, after all had been done that could have been done according to Mr. Edwards. *So we did not in Washington do any more than read this over and have it presented to us.*.

Q. I understand that. My question was, did you thereafter receive and reject that proposal?

A. I thereafter got a letter from Mr. Edwards—rather, from Mr. Thompson, secretary, and I replied to it and told him that the Belt Line regretfully rejected the agreement.

Q. That was my question. You did receive it and you did subsequently reject it?

A. Rejected the proposal.

Q. That was my question.

A. That is correct.

MR. MACMILLAN: No other questions, your Honor.

REDIRECT EXAMINATION BY MR. WILLCOX:

Q. Mr. White, Mr. MacMillan has asked you about the Ford plant and the Smith-Douglass operations, about the transfer of crews. Explain those in detail to the Judge; why you do it, how often it occurs, and what it is, and what facilities, if any, you have at the Ford plant or the Smith-Douglass plant for having those reporting points.

A. Mr. Willcox, I believe that can better be done by Mr. Burrows, our operating superintendent. I will be glad to tell you all I know about it but I am sure he knows the details more intimately than I do.

Q. You have testified that the Belt Line rejected that proposal. As a matter of fact, all the proposals that were submitted were rejected by one side or the other, were they not?

A. That is correct.

Q. Now, explain to the Court how come about Berkley Yard; what part of your operations take place

there and what is its relation to the rest of the road, whether it is the center of activities or causal point or something else.

A. Well, Berkley Yard is more or less the center of activities as far as the branching out of the tracks is concerned, and it's the largest classification yard we have. More traffic passes through there than any other yard, and the operation is more constant, I would say; we have crews that work there around the clock, 24 hours a day, and it's a point from which the crews can be dispatched more efficiently and economically under certain operating conditions than from other points. I'd say it was the center of the wheel, more or less.

THE COURT: It is the focal point of your operations? In other words, from there you can go into Norfolk, the city proper. Of course, Berkley is part of Norfolk city, but you go into the main part of Norfolk City, and you can also go into the city of Portsmouth from there?

THE WITNESS: And down the southern branch, and the Sewells Point.

MR. WILLCOX: That is all.

HARRY L. WHITE, JR., EXAMINED BY MR. MACMILLAN: (Tr. P. 158).

Q. Mr. White, during the course of mediation, either in Norfolk or in Washington, was any offer of arbitration made to you by the defendant?

THE WITNESS: Do I have to answer that question, Judge?

MR. WILLCOX: If your Honor please, that is a question I understood you to rule out.

THE COURT, No, I ruled out the details of any offer. I didn't rule out—

MR. WILLCOX: I object to it on the ground that it is immaterial and irrelevant.

THE COURT: Objection overruled.

A. Judge, as Mr. Willcox has brought out, the mediator, during the five-day session in Norfolk and the time that we were in Washington and on other occasions, had suggested all the possible means of settling the dispute. *But we did not receive a direct offer from the other side to arbitrate. We did not make a direct offer to arbitrate. It was just one of the suggestions that were made I suppose to both sides by the mediator. We have not received any offer to arbitrate from the organizations nor have we made any.*

Q. Did the mediator communicate to you any offer from the defendants to arbitrate?

A. He did not specifically ask us if we would arbitrate.

Q. Did he—

A. This is behind closed doors now.

Q. I am not asking you did he specifically ask you to. I am asking you whether he communicated to you an offer from the defendants to arbitrate.

A. *He did not. He consistently said they would not arbitrate; that they would not go to the mediation—I mean to the Adjustment Board or would not consider a special system board of adjustment. That file, the last we got closing out the case—*

Q. I am asking you now about Norfolk. We'll get to the other in a minute. You said no offer of arbitration was ever communicated to you by Mr. Roadley?

A. It was not.

Q. But suggestion of arbitration was made?

A. No. He mentioned the ways that the case could be progressed. We told him from the outset that we had a rule in the book which we thought gave us a right to make this change; we did not feel negotiations were necessary. We hadn't offered to negotiate. We hadn't received a request. The only thing that the file will show, and the Brotherhood's records will shown, that they made the statement we had no right to make the change without negotiations in accordance with the Railway Labor Act as amended.

Q. You are saying that at no time did Mr. Roadley communicate any offer of arbitration from the defendants?

A. *He did not.*

Q. Now, when the National Mediation Board proffered arbitration at the conclusion of the case, you did not accept arbitration then, did you?

A. *They did not proffer arbitration.*

Q. I don't mean proffer it. They inquired whether you desired to arbitrate?

A. *They never mentioned arbitration.*

MR. WILLCOX: The letter speaks for iteslf, Mr. MacMillan, if you are talking about the letter from the Mediation Board.

MR. MACMILLAN: I am.

MR. WILLCOX: Look at the letter.

A. Sure it was introduced the last time. It is a letter of June 30th, I think.

THE COURT: Here is a letter of June 30th, introduced as Plaintiff's Exhibit No. 1, signed by E. C. Thompson, Executive Secretary of the National Mediation Board, addressed to Mr. White, and also to the several presidents or grand chief engineers of the Brotherhoods. Do you wish to see it, Mr. MacMillan?

MR. MACMILLAN: I am attempting to find that letter and the complainant's reply to the letter.

MR. WILLCOX: Both in evidence.

MR. MACMILLAN: Just so they are in evidence.

MR. WILLCOX: We offered just one paragraph and you offered the whole letter from the complainant.

Q. (By Mr. MacMillan) Mr. White, did you ever have any communication with the Mediation Board after the letter of July 30th addressed to you from Mr. Thompson? Look at that letter.

A. I have a file there I'd like to get to refer to it. I have a complete record of everything that has happened.

Q. I show you a letter designated Defendant's Exhibit 1 and ask you if that is the letter you wrote in response to the letter dated July 30th, '56.

A. That is the letter.

Q. Did you have any other correspondence other than those letters on the question of arbitration?

A. We haven't had any correspondence. We had no correspondence on negotiations in connection with arbitration as such.

Q. That is not my question.

A. You mentioned arbitration.

A. I beg your pardon. You might have misunderstood me.

A. No. I understood you to say arbitration.

Q. After the letter of August 13th, which you wrote Mr. Thompson, have you had any other letters from the Mediation Board dealing with the question of arbitration? The answer is either yes or no.

A. I have to have time to look at my file.

Q. That is all I am asking. You are welcome to examine the file as much as you need.

A. I have had several letters since that time.

Q. Did any of them deal with the question of arbitration?

A. None whatsoever.

Q. I am talking about after August 13th now. None dealt with arbitration?

A. (Shaking head in negative.)

Q. Did you ever accept the suggestion of arbitration as contained in the letter of Mr. Thompson to you under date of July 30th?

A. *That is not arbitration, sir. That was a special system board of adjustment, which is quite a distinction between arbitration. We didn't talk about arbitration.*

Q. *You didn't talk about it?*

A. *No, sir.*

Q. And you didn't offer?

A. Didn't offer; because we have consistently contended—

Q. Just answer my question. You did not offer arbitration?

A. We did not offer arbitration.

THE WITNESS: May I say a word there, Judge, in that connection?

THE COURT: I guess you had better get Mr. Willcox—

THE WITNESS: I will wait until he asks me then.

REDIRECT EXAMINATION BY MR. WILLCOX:

Q. Mr. White, Mr. Mathews said that in 1941 he advised you that the railroad employees were abandoning their time claims in connection with Money Point because they had found out that the Adjustment Board did not have jurisdiction. Did you ever receive any such advice?

A. No, sir.

Q. In connection with the questions that Mr. MacMillan just asked you about arbitration. I thought I understood you to say that one of the mediators said the men would not arbitrate?

A. They did.

Q. You remember which one that was?

A. Mr. Roadley.

Q. Now, August 13th you replied to the Mediation Board's letter of July 30th. Afterwards did you get a telegram from the board?

A. Yes, sir, I did.

Q. Will you read that telegram to the Court?

A. Telegram is dated August 16th, 1956, 10:53 a.m. It is addressed to H. L. White, Jr., President and General Manager, Norfolk Portsmouth Belt Line Railroad Company, Norfolk, Virginia. It reads as follows:

"Re this board Case E-29, Norfolk and Portsmouth Belt Line Railroad, BLE, BLF&E, and BRT on subject of establishment of point in Berkley Yard, Norfolk, as point for going on and off duty of certain

yard crews, the organizations have notified this board that they are not agreeable to referring dispute to either First Division, National Railroad Adjustment Board, or special board of adjustment. The carrier's position is that any claims arising out of the proposed change, if and when made, should be progressed through National Railroad Adjustment Board, First Division. Under these circumstances you are hereby notified that the board mediation efforts in this dispute have been terminated and our file on this case has been closed as of this date by direction of the National Mediation Board. Joint White, Brown, Gilbert, Kennedy. Signed E. C. Thompson, Executive Secretary."

S. G. BURROWS, SWORN (Tr. P. 86)

DIRECT EXAMINATION BY MR. WILLCOX:

Q. You are Mr. S. G. Burrows, superintendent of the Belt Line, are you not?

A. Yes, sir.

Q. How long have you been with the Belt Line?

A. January, 1942.

Q. Where is your office?

A. Port Norfolk.

Q. Where do you spend your time, most of your time?

A. Berkley Yard.

Q. That is the focal point of your operations?

A. That is the hub of the wheel. Everything passes through Berkley but a few local cars that come from the Southern lines around Port Norfolk. Everything else goes through Berkley.

Q. Mr. Burrows, I hand you here seniority list and I ask you what this paper is.

A. That is a seniority list of all employees in engine and train service as of July 18, '56, separated between conductors, a special list for conductors, special list for engineers who are qualified, and then a regular list for the train service, which includes everybody, and also the engine service, which includes engineers and firemen. In

other words, the conductor—the qualified conductors, there is a list separated for them; the qualified engineers, there is a list separated for them; and then the main list has the conductors and trainmen on there and their proper sequence, and likewise for the engine crews.

Q. And the notes there are explained in footnotes?

A. The footnotes, I put in there; doctored this up in red, that represents men that are not actually working in train service, like yardmasters and off sick and what not. But this here is not on the main list. This is a list that I furnished up myself.

Q. That is men who are disabled, furloughed, and so forth?

A. Not actively working in train service.

Q. Does that give the date of employment of each man?

A. Yes, sir.

MR. WILLCOX: I offer that in evidence, your Honor.

THE COURT: Complainant's Exhibit No. 3.

(Received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. Mr. Burrows, have you examined your rolls to see how many of the employees—and when I speak of employees, I am limiting it to those in train and engine service—who actually live in Norfolk are reporting regularly to Port Norfolk for duty, before this change was made?

A. Yes, sir.

Q. How many?

A. Eight.

Q. Have you examined it to see how many of those who live in Port Norfolk were reporting regularly to Sewells Point?

A. Yes, sir.

Q. How many is that?

A. Eight.

Q. Now, of course there are from time to time extra men and emergency men that serve on those crews?

A. They were regular men that I speak of.

Q. Mr. Burrows, mention has been made of the operation at the Ford plant and at Smith-Douglass concerning the relief of some crews at least by sending them from Port Norfolk in an automobile. Explain each of those movements to the Court separately, please, and the reason for them.

A. Do you want the Ford operation explained in detail?

Q. No, I don't think you need to go in detail unless my friend wants it. Just simply give the periods of the shift and tell whether or not its is necessary for a continuous operation over there and how many crews you send over there.

A. We work the Ford plant about ten months a year and the Virginian work it the other two.* * *

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(Tr. P. 95)

Q. Now, the first trick is from eight to four, is it?

A. On that crew, yes, sir.

Q. And the second from four to midnight?

A. The second is from three to eleven.

Q. And that one crew is the oniy one you relieve that way?

A. At Ford, yes, sir.

Q. If they did not use a station wagon, is it not true that the whole engine would have to come back to Port Norfolk to bring those men?

A. Yes, it would have to come back and we couldn't give the Ford plant—I don't believe that we would give the Ford plant the service that they ask.

Q. We are not talking about the Ford plant. But as a practical proposition you have got to send them out there or bring the engine back to Port Norfolk?

A. That is right.

Q. And I think it is safe to assume that bringing the engine back to Port Norfolk in itself would be more expensive than operating a station wagon, wouldn't it?

A. By far.

Q. To say nothing of the time of the men. Now, Mr. Burrows, the job at Smith-Douglass is substantially the same except that is limited to the fertilizer season, isn't it?

A. And not an assembly line. And farther to go with the engine.

THE COURT: When you speak of Smith-Douglass, I suppose there are other industries, fertilizer industries?

THE WITNESS: In the vicinity, yes. Smith-Douglass is the major one in that territory.

THE COURT: But it is called the Money Point section?

THE WITNESS: Yes, sir.

Q. (By Mr. Willcox) They are the only two operations of that kind you have, are they not?

A. Yes, sir. Only that sometimes it's either the Smith-Douglass crew or the crew working a little further up in some other industries. It's one or the other, but it's one crew. And it just happens through part of the fertilizer season, which doesn't start good maybe until February, March, April—it runs into February and March, April and some part of May. But of course that crew is not relieved during all that period, but a big part of it.

Q. Have you or not a yardmaster office or a yard office either at Money Point or at the Ford plant?

A. No, there is no yardmaster's office at either the Ford plant or Money Point.

Q. Are there any facilities at either place for the crew?

A. No, sir.

Q. No washroom, locker room, or anything of that kind?

A. No, sir.

THE COURT: Mr. Willcox, this afternoon you asked Mr. White a question about how many men would be affected. I don't know whether you even want to ask Mr. Burrows that question. It doesn't make any difference to me.

MR. WILLCOX: I will ask him.

THE WITNESS: I have it there but I think Mr. White has found that file. I would have to look. I think it was 107.

MR. WILLCOX: I think Mr. White gave it.

THE WITNESS: He gave it all, but I don't think he gave the engine and train service. But if I recall right, it's about 107 men in train service and 75 in engine service. That is within one or two.

THE COURT: If I recall, Mr. White gave an approximation which, if that is satisfactory, is good enough, around 170 some all told I think on one type of service and 130 some odd in another type.

MR. WHITE: That figure, Judge, is 171 in train service, including one hustler, and 138.

Q. (By Mr. Willcox) Are those the correct figures, Mr. Burrows?

THE COURT: Well, that is near enough.

MR. WILLCOX: That is all.

CROSS-EXAMINATION BY MR. MACMILLAN:

Q. Mr. Burrows, have you had an opportunity to compute the time or wages that will be saved by having the men report to Berkley rather than to Port Norfolk?

A. I haven't worked up any savings on that but it would save to—I think thirty minutes a crew would be a very fair average, around. They may do it a little bit quicker one way or another but I think an average of thirty minutes a crew, you'd save on the relieving time at Berkley. But that is not all you save.

Q. I understand that. When you say that is not all you save, sir, what do you mean by that? You are referring to taking the engine back and forth?

A. I am referring to you get more flexibility and more utilization out of your electric engines, your Diesel engines at Berkley, and you will accomplish much more switching in Berkley Yard due to a continuous operation. Prior to that there was lots of times a gap of maybe thirty or forty minutes there while one crew was going in and the other was coming out. So it shows up in the classification of cars at Berkley and a better utilization of the engines due to the round robin relief.

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J. W. HAYES, a witness for the defendant, was sworn (Tr. P. 129)

EXAMINED BY MR. MACMILLAN:

Q. Do the members of your lodge want to go to Berkley without an agreement covering these working conditions?

A. No, sir, not without an agreement to cover it.

Q. Are they working against their will in Berkley today?

A. Well, they are, I'd say, and will be until an agreement is worked out to cover these hardships that are imposed on them, yes, sir.

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CROSS-EXAMINATION BY MR. WILLCOX: (Tr. P. 130)

Q. Mr. Hayes, there isn't any doubt in the world about the fact that this controversy centers around the men's claim that they are entitled to time and expense for travel from Port Norfolk to Berkley?

A. I don't know that I understand your question, Mr. Willcox.

Q. Let me make it a little plainer so you can.

THE COURT: You are talking about this controversy right now?

MR. WILLCOX: The controversy between the Brotherhoods and the railroad company which led to this situation.

Q. I think you have testified to it but I just want to get it straight. You admit that is a prerogative of management, the railroad company has a right to use Berkley Yard as a starting point and stopping point of trains?

A. They have that right.

Q. And you contend and the Brotherhoods contend that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods providing for what you call the hardships, that is, the time consumed and the expense; that is correct, isn't it?

A. I didn't say that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done.

Q. Those hardships have been the subject of the negotiations, haven't they?

A. They have, yes, sir.

Q. You speak of an hour's time in each direction. You know how far it is from Port Norfolk to Berkley Yard?

A. Well, that depends on the way you go, sir.

Q. Take the most direct route through the tunnel and into Berkley.

A. The best I recall, we have it here in this file, something around —

Q. Four and a half miles, isn't it?

A. The most direct route, around five miles.

MR. MACMILLAN: I might help, Mr. Willcox. We have not taken issue with the testimony of Mr. Bowen, I believe the name was, as to the distances and expenses involved.

I will tell Mr. Willcox in advance, we will offer a witness who will prove the time and expense involved to go by public conveyance, which Mr. Bowen omitted. But other than that, we have no objection to their testimony.

Q. (By Mr. Willcox) Mr. Hayes, it doesn't take an hour to go from Port Norfolk to Berkley Yard, does it, by either route, unless you go around the toll free route?

A. Mr. Vaughan, of our organization —

Q. I am not talking about Mr. Vaughan. I am talking of your own knowledge.

A. Well, I never have been over there, Mr. Willcox. Mr. Vaughan has timed it. He can answer the question.

Q. *Let's talk about the modus operandi of the mediation. Is is not a fact that when the mediator, Schoonover came down here that we all met in the terminal building at the Union Station and that you and your associates were in one room, Mr. White and Mr. Burrows and I were in another?*

A. *Part of the time, that was the case.*

Q. *And Mr. Schoonover went in and talked to you in our absence?*

A. *That is right.*

Q. *And then he came in and talked to us in your absence?*

A. *That is right. And then we all talked.*

Q. *And then at least once and possibly oftener we got together and had a general discussion?*

A. *That is right.*

Q. *Now, when we went to Washington you were there, weren't you?*

A. *That is right.*

Q. *And most of us or several of us met outside the building and went in the building together; that is correct, isn't it?*

A. *Yes, sir, to begin with.*

Q. *To begin with. And then they separated us. They put the Brotherhoods in one room and put us in another?*

A. *That is true.*

Q. *And Mr. Edwards went backwards and forwards?*

A. *Yes, sir.*

Q. *And we, of course, don't know what he said to you all and you, of course, don't know what he said to us?*

A. *No.*

Q. *And the only time we got together was late in the afternoon?*

A. *That is right. It was at the time he made the proposal to all of us.*

Q. *And that was the only time that we got together there?*

A. Yes, sir.

Q. You speak of the hardships. Some of the employees, most of them I believe, live in Portsmouth, do they not?

A. A good many of them, yes, sir.

Q. Some live in Norfolk?

A. Some, yes, sir.

Q. And some live in Berkley or South Norfolk?

A. I couldn't testify to that.

Q. Well, assume that to be a fact. Going to Berkley Yard is no hardship on those people, is it?

A. Not those few that live in that community.

Q. And it's no hardship on those that live in Norfolk, is it, as against Port Norfolk?

A. No, sir.

Q. And under the agreements and the working rules of the Brotherhood, men have a right to bid on jobs according to their seniority?

A. That is right. May I qualify that last answer?

Q. Yes, sir.

* * * * * * * * * * * * * * * * *

(Tr. P. 139)

Q. (By Mr. Willcox) Mr. Hayes, have you with you the copy of the telegram that you sent to the Mediation Board in February?

A. I will have to check this file; if you will bear with me.

Q. When this matter was first reported to them. February 13th I think is the date of it.

A. Yes, sir, I have a copy of it here.

Q. Will you read it.

A. Addressed to Mr. E. C. Thompson, Secretary, National Mediation Board, Washington, D. C. Says:

"Serious situation existing on Norfolk Portsmouth Belt Line Road as the result of management *arbitrarily moving the terminal from Port Norfolk to Berkley*, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

Q. That is the telegram that you sent?

A. That is the telegram that was sent, yes, sir.

Q. Mr. Hayes, since this move has been made, has any member of the Brotherhood of which you are the general chairman filed a time claim for the time involved in going to Berkley Yard or for the expense incurred?

A. No, sir. We don't have a rule to cover it. We haven't been able to negotiate an agreement to cover that.

Q. None has filed a claim?

A. None has reached me.

Q. Has any member of the Brotherhood with which you are connected filed any claims of any kind growing out of the move since the move was made?

A. *Not to my knowledge, Mr. Willcox. When we make claims we have to have a contract rule to base them on and we don't have any covering this situation.*

Q. *Do you mean to say that you have no contract rule that would entitle the men to claim extra pay for the time involved?*

A. *No, sir.* That is what we were trying to negotiate, a rule to cover this particular move here and hardship that was imposed.

Q. Let me be sure that I get you right. I don't want to be confused myself. As I understand you now, you admit that *there is no rule in force on which you could base a claim, on which the employees could base a claim for compensation during the time consumed in travel from Port Norfolk to Berkley and return?*

MR. MACMILLAN: Mr. Willcox, we have admitted that in the answer.

A. *We have said that, yes, sir. That is the truth.*

Q. And what you want to do is to negotiate a contract or a rule which will entitle you to that?

A. *That is the truth, yes, sir. And as stated to you and to Mr. White in conferences, we feel that it is incumbent upon the railroad to serve notice under the Railway Labor Act when they intend making such change.*

Q. We understand that. That is your contention. Now, what is the time limit in which a trainman can put in a time claim after he has done the work?

A. I think it's 60 days — 45 — 60; under the agreement.

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C. W. MATHEWS, a witness for the defendants, was duly sowrn (Tr. P. 146)

EXAMINED BY MR. MACMILLAN:

Q. Would the members of your lodge be working in Berkley if it were not for the injunction that has been entered in this Court?

A. No, sir. The members, they voted 100 per cent to strike the carrier unless it gave them a working agreement or working condition according to the change.

THE COURT: I don't understand this Court entered the injunction.

MR. MACMILLAN: If I said that, I was in error, your Honor.

THE COURT: I just want to get the facts right.

Q. Are the men working in Berkley against their will?

A. Yes, sir, I would say they are.

MR. MACMILLAN: Answer Mr. Willcox

CROSS-EXAMINATION BY MR. WILLCOX:

Q. Mr. Mathews, I understood you to say the last that you were paid—I am speaking now of the 1941 job when you were at Money Point—for time from Port Norfolk to Money Point and return?

A. No, that was the dispute, Mr. Willcox. We were after an agreement for the pay, transportation and time consumed traveling to and from Berkley.

Q. You were not paid then?

A. No, sir.
Q. And you put in claims?
A. Yes, sir.
Q. And did not progress them beyond the company?
A. We didn't.

MR. MACMILLAN: Mr. Willcox, his question was directed what did the company do after they abandoned Money Point and he said at that time they were paid.

MR. WILLCOX: I misunderstood him.

THE WITNESS: I said after they abandoned, the operation was carried back to Port Norfolk and we were placed first in taxicabs and then station wagons and carried over there and our time begun when we reported at Port Norfolk and ended when we relieved at Port Norfolk.

Q. You are talking now about the footboard relief down at the fertilizer section?
A. That is right; Money Point.
Q. And also the footboard relief at the Ford plant?
A. That is correct.
Q. And those are the two times you are talking about. You say the men are working in Berkley against their will?
A. I'd say yes.
Q. Does that apply to those who live in Norfolk too?
A. Well, Mr. Hayes, I think he cleared that. I don't know about the ones that live in Norfolk.
Q. Does it apply to the ones that live in Berkley?
A. I guess it would apply to all. I don't know. I couldn't express the men's opinion, Mr. Willcox. I don't know.
Q. What objection can a man who lives in Norfolk have to reporting to Berkley Yard rather than to Portsmouth?
A. *We took that into account. And the men in Norfolk are not involved.*
Q. That isn't the question I asked you. What objection could a man who lives in Norfolk have to reporting to Berkley Yard instead of to Port Norfolk?

A. Well, I don't know. Of course, I can only speak for myself.

Q. *It would be easier to get to Berkley, wouldn t it?*

A. *Absolutely. For me, it would.*

Q. *Easier and cheaper?*

A. *That is right.*

Q. *And you live in Norfolk?*

A. *That is right.*

Q. And the same thing is obviously true of those who live in Berkley. And if nobody else wants those jobs the men who live in Norfolk and are now reporting to Port Norfolk could bid them in?

A. Anyone who has seniority can bid on any job.

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FOY K. VAUGHAN, a witness for the defendants was sworn (Tr. P. 151)

Q. Would the members of your lodge be working in Berkley if it were not for the injunction entered in this cause?

A. No, sir.

Q. Are the men being worked in Berkley against their will at this time?

A. I would say yes, sir.

* * * * * * * * * * * * * * * *

CROSS-EXAMINATION BY MR. WILLCOX: (Tr. P. 153)

Q. You say the company has furnished transportation to Berkley. Those have been the instances of the footboard relief at the Ford plant?

A. No, sir.

Q. They don't do it there?

A. Oh, they do it there.

Q. And they have done it at Money Point?

A. Yes.

Q. And sometimes they have an emergency and they have to send a crew over there and they do it then?

A. In Berkley Yard, yes, sir.

Q. *But they don't do it regularly because they don't transport crews regularly except the Ford plant and the Money Point plant?*

A. *That is right.*

(All italics in quoted testimony have been added).

OPINION OF THE DISTRICT COURT

On September 24, 1956, the Circuit Court of the City of Norfolk, Virginia, granted to plaintiff, Norfolk and Portsmouth Belt Line Railroad Company (hereinafter referred to as "Belt Line" or "carrier"), a temporary injunction directed against the Brotherhood of Railroad Trainmen, Lodge No. 514, the Brotherhood of Locomotive Engineers, Lodge No. 331, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and two defendants in their individual capacities and as Local Chairmen of the respective Brotherhoods. The injunction restrained the parties from "calling, ordering, authorizing, encouraging, inducing, approving, continuing, starting, or permitting any strike or collective work stoppage" on the Belt Line, and further restrained defendants from "in any manner interfering with, inducing, or endeavoring to induce, any person employed by the complainant (Belt Line) to interfere with the performance by any employee of said complainant (Belt Line) of his work and duties, and from, in any manner, endeavoring to induce such employee to desist from performance of his regular duties." The original injunction having expired prior to the rendition of this opinion, it was continued in effect by this Court on appropriate motion.

In accordance with the laws of Virginia the injunction was granted by the state court *ex parte*. The defendants have removed the action to this Court.

The ultimate question turns upon the validity of the threatened strike under the facts of this case. If the defendants were lawfully entitled to call for the work stoppage as of September 26, 1956, the injunction must be dissolved. If otherwise, the injunction must remain in effect at least pending further proceedings from an administrative standpoint.

Many of the essential facts are not in dispute. The carrier is a switching terminal railroad maintaining and operating yards in what may be described as Port Norfolk and Berkley. The Brotherhoods, all unincorporated associations and subordinate lodges of national organizations, serve as collective bargaining agents for their respective members, and, as such, are labor organizations and representatives within the meaning of the Railway Labor Act, 45 U.S.C., §151 *et seq.* The carrier owns tracks within the Cities of Portsmouth, South Norfolk and Norfolk, as well as in the County of Norfolk. It has also obtained certain operating rights over portions of the tracks of the Norfolk Southern Railway and Virginian Railway. It renders interchange service to nine railroads serving this area, and directly serves many large and vitally important industries, including the Norfolk Naval Shipyard and the United States Army Base. Suffice it to say that a work stoppage on the line of the carrier would cause irreparable damage to the carrier and to the public. It would substantially paralyze industry in the area involved.

The foundation of this controversy lies in the carrier's change of location for starting and relieving its crews. For many years the carrier has been starting and relieving its crews in two localities, one at Sewells Point in the northern end of the City of Norfolk, and the other at Port Norfolk which is located in the City of Portsmouth. In 1941 the carrier designated Money Point, a section of Norfolk County devoted largely to substantial industries, including the manufacture of fertilizer, as a place for going on and off duty. The employees so designated and required to travel to and from Money Point filed claims for time compensation in traveling and reimbursement for expenses. These claims were handled "on the property"

and finally denied by the President of the carrier line. The claims were *not* taken to the National Railroad Adjustment Board, First Division, and the Money Point reporting station was thereafter abolished the following year.

The so-called Berkley yard is the hub of the wheel. Trains going to Sewells Point and Port Norfolk pass through the Berkley yard but thereafter travel in divergent directions. As the carrier has heretofore used steam locomotives, it was necessary to service the same at the end of each shift or tour of duty. Steam locomotives working in and out of the Berkley yard were returned to Port Norfolk for such servicing. For these reasons, the crew members operating trains in and out of the Berkley yard reported on and off duty at Port Norfolk, and rode on company time between the respective points on the locomotive which, on many occasions, traveled "light."

During the latter part of 1955 and early 1956, the carrier concluded to use Diesel locomotives in substitution for steam. The economy of the new operation is not seriously contested but, by reason of this change, it would no longer be necessary to return the locomotives from the Berkley yard to Port Norfolk for servicing. To accommodate its crews the carrier erected, at the Berkley yard, a new building equipped with lockers, shower baths, toilets, etc. It also provided sufficient parking space for the employees who desired to travel to and from work by private automobiles.

It should be noted that, for many years, the carrier has provided free transportation on carrier's time from Port Norfolk to the Ford plant, to Money Point, and, in isolated instances, to the Berkley yard; such transportation being generally by station wagon owned by the

carrier. As to the Ford Plant, this became necessary by reason of the Plant's activities requiring the immediate removal of an assembled automobile so as not to impede the output. To cause a break in time for a locomotive to go from the Ford Plant to Port Norfolk for the purpose of picking up a new crew, and thereafter return to the Ford Plant, would seriously disrupt plant operations. With reference to Money Point, the necessity for this practice arises only during the seasonal months when the fertilizer plants concentrated in that area are operating at full capacity. Transportation by station wagon to and from the Berkley yard is occasioned by emergencies, including the breakdown of a locomotive. The Court does not lend too much emphasis on the practices mentioned in this paragraph.

Having heard rumors to the effect that a change in the reporting relief points was contemplated, the respective Chairmen of the Brotherhoods addressed a letter to the President of the Belt Line, dated November 25, 1955, and referred to under paragraph 11(a) of the answer, said letter having been introduced in evidence by stipulation of counsel. Stating the employees' position, it is said:

> "It is the employees position that through many years of custom, practice and acquiescence, Port Norfolk, and Sewells Point have become firmly established as the two points where Norfolk & Portsmouth Belt Line crews can be required to report for and be relieved from duty. The employees of the Norfolk and Portsmouth Belt Line have established themselves in neighborhoods convenient to these established places of reporting and relief and it would be manifestly unfair for the company to deprive them of the benefits of such an arrangement by arbitrarily creating an additional reporting and relief point for yard crews at Berkley yard.

> "It is the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended."

Undoubtedly the wording of this letter created some feeling between the carrier and the representatives. It is certainly the prerogative of management to change the designated reporting points, but it is equally the prerogative of the employees to insist upon negotiation in matters involving "conditions of employment" and, in the event negotiations fail, the right to strike remains inviolate.

There are approximately twenty-five to thirty men who have heretofore been reporting at Port Norfolk and who, since the granting of the temporary injunction, are reporting and being relieved at the Berkley yard contrary to their wishes. Additionally, the evidence discloses that all employees within the units represented are now reporting as directed by the carrier, all of which is under protest as the employees would have gone out on strike but for the injunction. Included among the estimated twenty-five to thirty men previously reporting at Port Norfolk are eight men living in Norfolk, and undoubtedly it is far more convenient and less expensive for these men to report and be relieved at the Berkley Yard. Furthermore, there are eight men living in Port Norfolk who have heretofore been regularly reporting at Sewells Point. As to these men, if their seniority permits them to secure the new jobs created in the Berkley yard, it is certainly more convenient and less expensive for them to report to the Berkley yard. It appears, therefore, that there are approximately nine to fourteen employees (depending upon seasonal variations) who may be directly and adversely affected by the change to the Berkley yard.

By public conveyance the average time required for travel from Port Norfolk to Berkley, via toll tunnel, is one hour and ten minutes, with an expense of 42c each way. In the majority of instances, however, men use private automobiles.

The shortest route in time and distance, by private automobile, from the Port Norfolk yard office to the Berkley yard office, is through the toll tunnel involving an expense of 30c per trip for car and driver, plus 5c for each passenger, and a distance of 4½ miles each way. Via the toll bridge, known as the Jordan Bridge, the distance is approximately six miles, and the toll is 35c per round trip for car and driver, plus 5c each way for each additional passenger. The third alternative route is toll free but this requires an estimated 12 miles of travel one way. There are no tolls between Sewells Point and Berkley and any employee heretofore living in Norfolk and reporting at Port Norfolk would save a toll charge and approximately three miles of travel by reporting to the Berkley yard. Despite these apparent advantages to many of the employees, the answer to the ultimate question does not lie within the scope of such benefits.

The carrier did not immediately respond to the letter of November 25, 1955, due to the fact that its plans had not fully materialized. On February 9, 1956, the President of carrier requested a meeting in his office on the following day. The representatives attended this meeting at which time a letter, dated February 10, 1956, was delivered to them, signed by the President. In part, the letter states:

> "It should be distinctly understood, however, that this conference is not to be construed as being held for the purpose of negotiations in connection

with the matter under consideration and will be held without prejudice regarding the positions of all concerned.

"No formal notice of any changes in the company's plans has been given to any organization representing its employees since such change in plans will depend on operating conditions and will be made in accordance with the provision of the current agreements with the various organizations representing this company's employees. Therefore, no formal notice of any proposed changes in the company's program of operations is required."

After making reference to the various provisions of the several agreements relating to "point for beginning and ending day," the letter continues:

"From the above, it will be noted that the point for going on and off duty will be governed by local conditions and that this point is not fixed as to specific location and does not necessarily have to remain the same for any specified period of time. It is, therefore, subject to change by the management of this company and is governed by local conditions which is determined by operating requirements at the management's discretion in accordance with the article referred to above."

* * * * * * * * * * * * * * *

"In view of the articles referred to above, there is no restriction placed on this company which prevents it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended."

In the essence, the provisions in the Schedule of Rates, Rules, and Regulations, effective December 1,

1941, are the same with each class of employees involved herein. An example is here quoted as to Conductors and Brakemen under Article VI:

> "(a) Yard crews shall have a designated point for going on duty and a designated point for going off duty.
>
> "(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location."

At the conference of February 10 the President stated that he would not entertain any conference for the purpose of negotiating changes in working conditions, all of which is apparent from the tenor of his letter. No further "on the property" conferences transpired at that time. The Brotherhoods endeavored to secure the services of the National Mediation Board but, by letter dated March 5, 1956, the Board declined to docket the application at that time. Thereafter, on April 26, 1956, the carrier notified its employees by appropriate bulletins and advertisements that the contemplated change would be effective on May 2, 1956, and that commencing that day six of its thirty-four crews would be required to go on and off duty at the Berkley yard. The carrier invited bids on the new assignments in accordance with seniority rules.

The Brotherhoods forthwith called a general work stoppage effective May 2, 1956. Its representatives notified the National Mediation Board, which body, acting under §5, First (b) of the Railway Labor Act, 45 U.S.C.

§155, First (b), proffered its services. The parties thereupon agreed to allow all matters to remain in *statu quo* pending efforts of the Board to settle the controversy. Two mediators successively visited Norfolk and discussed the matter with the parties but without success. While the Court excluded the details of any "on property" conferences, as well as details of negotiations thereafter in Washington, it is abundantly clear that the general subject of discussion was the travel time and expense involved by reason of the proposed change. Whatever may have been the original intent of the Brotherhoods to insist that the change in reporting place could not be effected without their consent, this contention, if ever proposed, was quickly abandoned. The right to make the change is conceded, but the Brotherhoods insist upon the right to negotiate with respect to any hardships created by such a change and, in view of the ultimate failure of negotiations, exercised its power to call a strike.

Subsequent negotiations before the National Mediation Board at Washington, D. C., similarly resulted in a failure of any agreement. A Mediation Agreement and Proposal was suggested by the Board, agreed to by the Brotherhoods, but rejected by the carrier; all of which was clearly within the carrier's prerogative. The Board, by letter dated July 30, 1956, made reference to other alternative procedures, including the availability of the National Railroad Adjustment Board or the creation, by agreement, of a special or system board of adjustment under the provisions of Sec. 3, Second, of the Railway Labor Act. The carrier responded to this letter stating its position that the disagreement was a matter properly referable to the National Railroad Adjustment Board, First Division. Indeed, the carrier now insists that the National Adjustment Board must consider and act upon

the matter before the Brotherhoods may exercise the right to strike. Upon receiving the carrier's letter as summarized above, the Mediation Board, by telegram dated August 16, 1956, terminated its mediation efforts and closed its file, after having first been advised by the Brotherhoods that they were not agreeable to referring the dispute to the National Railroad Adjustment Board, or to a special board of adjustment. The Brotherhoods insist that the issue involved is one for negotiation, and, when negotiations fail, the right to strike exists.

The record does not indicate that either party offered to arbitrate the matter under 45 U.S.C. §155, Third.

After waiting a period of thirty (30) days, the carrier posted a notice on September 21, 1956, to be effective at 7:00 A.M. on September 26, 1956, that the Port Norfolk reporting station would be abolished, and inviting bids for the new jobs at the Berkley yard. Three (3) days later the Brotherhoods notified the carrier that a strike had been called effective 7:00 A.M. on September 26, 1956. The State court injunction was then granted to the carrier.

The wording of the agreements between the carrier and the Brotherhoods is substantially identical to many other similar agreements which have been the subject of labor disputes of this nature. It is significant that, in the vast majority of cases considered by the National Railroad Adjustment Board, First Division, carriers have insisted that the matter now in controversy is classified under the heading of rules, rates of pay or working conditions, and that the National Railroad Adjustment Board is without jurisdiction. While the Adjustment Board has universally stated that it has jurisdiction over the dispute, the claims have been disposed of by a terse statement similar to the following:

"This dispute comes before the Division on the question of the reasonableness of designated point for going on and off duty, the determination of which is a matter for negotiation and the Division so holds."

For reference to the foregoing, see:

1. Award No. 10603, Docket No. 15422 (5/22/45)
2. Award No. 12035, Docket No. 15683 (3/23/48)
3. Award No. 14941, Docket No. 23829 (11/15/51)

In the instant case the carrier not only insists that the Adjustment Board has jurisdiction, but also contends that the individual employees must report at and be relieved from duty at the Berkley yard against their will and thereafter file and process their claims "on the property" and then through the Adjustment Board as a condition precedent to going out on strike. Counsel stated in oral argument that the time required for processing such matters may be as much as four to five years due to the condition of the docket of the National Railroad Adjustment Board, First Division. It would certainly be futile to proceed in such a manner and then be met with a brief statement to the effect that the matter was *one for negotiation*. Furthermore, the employees had filed no claims at the time of the issuance of the injunction and presumedly have filed none since that date. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction.

As heretofore noted the carrier has established a practice, custom and usage of reporting on and off duty at the Port Norfolk yard. It has provided transportation

on carrier's time and expense via steam locomotive. Conceding that the carrier had an absolute right to designate the Berkley yard as a reporting and relief point, does this not constitute a change in working conditions which is the proper subject of negotiation? That the parties did negotiate as to the alleged hardships arising by reason of the contemplated change can hardly be questioned. If the controversy is one which is truly the subject of negotiation, it may, of course, be settled only by a voluntary agreement between the parties. Management's inherent right to designate a change of locality for reporting and relief does not, in and of itself, exclude labor's right to demand that hardships arising therefrom be negotiated and, in the event of failure along these lines, to call for a work stoppage. Courts are not empowered to force the parties to enter into contractual agreements.

Under the provisions of §2, Seventh, of the Railway Labor Act, 45 U.S.C. §152, Seventh, it is said:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreement except in the manner prescribed in such agreements or in §6 (45 U.S.C. §156) of this Act."

In the same section under "Tenth", it is provided:

> "That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

When we turn to §6 (45 U.S.C. §156), we find:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Technically at least, no official notice was given of any intended change in agreements pursuant to §6. The carrier has consistently taken the position that no such notice was necessary on its part. As heretofore noted, however, the alleged hardships arising from the contemplated change involving travel time and expense were the subject of negotiation before the Mediation Board and it is apparent that a supplemental agreement covering these alleged hardships was sought by the Brotherhoods. In this respect the present controversy differs from *New York Central R. R. Co.* v. *Brotherhood of Rail. Train.*, D. C. Ohio, 140 F. Supp. 273, decided May 1, 1956, which, at first blush, would appear to be a parallel case. In *New York Central* it is not contended that any practice, usage or custom had been established by the carrier wherein

transportation had been provided on carrier's time to and from the actual place of work. It is further stated that New York Central was at all times ready and willing to discuss, negotiate, mediate or arbitrate the problems growing out of the reallocation of work of the 35 employees involved by the change of yards. *New York Central* concerns only the positive assertion by the Brotherhoods that management may not make such changes without opening the avenue to further concessions totally aside from the hardships, if any, which may arise to the employees directly involved. In the instant case we have a practice, usage and custom established by the carrier which was about to be changed, with a reluctance on carrier's part to negotiate on the problems arising therefrom. Indeed, as defendants point out, there would be no occasion to negotiate the issues of "continuous time and transportation expense" unless defendants conceded that the carrier had the inherent right to make the change.

The intent and purpose of §6 of the Act is to fix a procedure for the commencement of conferences relative to changes in the agreement. The section was not intended as a restriction of the bargaining agent or a requirement of personal notice to employees. *McMullans v. Kansas, Oklahoma & Gulf Rwy. Co.*, 10 Cir., 229 F. (2d) 50, certiorari denied, 351 U.S. 918. It can certainly be waived by the affirmative act of the parties when they have negotiated and failed to reach an agreement.

It is apparent that there is jurisdiction vested in the Adjustment Board under 45 U.S.C. §153, First (i), to consider disputes between employees and carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, conditioned that the disputes are first handled in the usual manner up to and including the

carrier's chief operating officer; but, if the parties fail to adjust their differences in that manner, the disputes *may* be referred to the Adjustment Board by the petition of the parties or either party. The law does not make it mandatory that such disputes concerning rates of pay, rules, or working conditions be referred to said Board.

From the foregoing it appears to this Court that the circumstances surrounding this dispute fall within the classification of a "major" dispute in law. To a limited extent it may be trivial, but it is distinguished from mere "grievances" which must go to the Adjustment Board. *Hughes Tool Co.* v. *National Labor Relations Board*, 5 Cir., 147 F. (2d) 69.

This brings into focus the recent apparently conflicting decisions from the Fifth Circuit in *Brotherhood of Railroad Tran.* v. *Central of Ga. Ry. Co.*, 5 Cir., 229 F. (2d) 901, and the Seventh Circuit in *Chicago River & Indiana R. Co.* v. *Brotherhood of Rail. T.*, 7 Cir., 229 F. (2d) 926. Certiorari was granted by the United States Supreme Court in each of these cases on October 16, 1956. The ultimate decision by the Supreme Court may (but not necessarily so) clarify the existing confusion, but it would be improper for this Court to await same which may not be determined for many months. The issue in the cited cases turns upon the applicability of the Norris-LaGuardia Act, 29 U.S.C. §101-115; to Fifth Circuit, by a majority opinion, holding that the Act applied; with the Seventh Circuit ruling to the contrary. A portion of the Norris-LaGuardia Act provides (29 U.S.C. §108):

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has

> failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U. S. 50, 64 S. Ct. 413, 88 L. Ed. 534, Justice Rutledge delivered the unanimous opinion of the Court in holding that the Norris-LaGuardia Act required, as a prerequisite to the granting of an injunction, the exhaustion of the alternatives afforded by the Act and said:

> "It (the Act) sought to make injunction a last line of defense, available not only after other legally required methods, but all all reasonable methods as well, have been tried and found wanting.
>
> * * * * * * * * * * * * * * * * *
>
> "Obviously, if the view of the Court of Appeals is right, the condition requiring 'every reasonable effort to settle' the dispute becomes a dead letter in railway labor disputes, since no more would be required by its terms in that application than is called for by the first condition which demands compliance with legal obligations. Respondent, however, while apparently agreeing with the Court of Appeals that compliance with one method is sufficient, relies not only upon its negotiation, but also upon its participation in mediation. This serves it in no better stead. The section is not disjunctive as to arbitration, but conjunctive as to negotiation and mediation. The case is one, so far as both language and policy, go, of one or all."

Holding in the instant case that the matters in dispute are proper subjects of negotiation, that the parties have negotiated to no avail, that further compliance with §6 of the Railway Labor Act is unnecessary in view of

prior failure of negotiations, that neither party has requested arbitration, that it is not incumbent upon defendants to resort to the Adjustment Board as a condition precedent to calling a strike, and that the carrier has not exhausted its efforts to arbitrate the matter voluntarily, the Court arrives at the conclusion that the employees were legally within their rights in calling for work stoppage effective September 26, 1956, and the injunction must be dissolved.

Counsel for defendants will prepare an order to this effect, adopting this opinion as the Court's findings of fact and conclusions of law, which, after presentation to opposing counsel for inspection, shall be submitted to the Court for entry. The order shall include provision for the dismissal of this action as to Brotherhood of Locomotive Engineers, Lodge No. 331, which defendant was dismissed by agreement of counsel at the time of oral argument. Contemporaneously with the entry of an order dissolving the injunction, the Court will entertain a motion to reinstate the same upon the filing of a notice of appeal from the order of this Court. The disastrous circumstances resulting from a strike justify such action by the Court pending a final determination of the interesting legal questions by the appellate court.

(Sgd.) WALTER E. HOFFMAN,
United States District Judge

Norfolk, Virginia
January 25, 1957

JUDGMENT OF FEBRUARY 8, 1957, FROM WHICH APPEAL IS TAKEN

This day came the parties by counsel to again be heard on the pleadings herein filed, the evidence heard ore tenus, the exhibits filed, and the findings of fact and conclusions of law contained in the Court's Opinion heretofore filed on January 25, 1957, and,

It appearing to the Court that the Brotherhood of Locomotive Engineers Lodge No. 331 has never been served with process, and counsel for all parties having agreed that the Court is without jurisdiction over the person of said Brotherhood, it is

ORDERED that the Brotherhood of Locomotive Engineers, Lodge No. 331, be and it hereby is dismissed as a party defendant in this cause; and,

It further appearing to the Court after a full hearing of this cause on the merits and for the reasons set forth in its Opinion herein on January 25, 1957, that the temporary injunction granted by the Circuit Court of the City of Norfolk, Virginia, on September 24, 1956, and extended by order of this Court on December 20, 1956, should be dissolved, it is

ORDERED that said temporary injunction, be and it hereby is dissolved, and the Court doth adopt as findings of fact and conclusions of law the Court's Opinion of January 25, 1957, and doth further order that the defendants recover their costs of the complainant.

JUDGMENT CONTINUING INJUNCTION IN EFFECT PENDING OUTCOME OF APPEAL

It appearing to the Court that since the entry of the judgment of this date dissolving the temporary injunction heretofore granted and extended, the plaintiff has filed notice of an appeal from said judgment to the United States Court of Appeals for the Fourth Circuit in accordance with Rule 73 F.R.C.P. and after due notice to the defendants has moved the Court to suspend the execution of said judgment or to grant a new injunction to the same effect during the pendency of its appeal in accordance with Rule 62 F.R.C.P., and said plaintiff having heretofore given a bond in the penalty of $10,000.00 with surety approved by the Clerk of this Court, conditioned for the payment of such costs and damages as may be incurred and suffered by any party who is found to have been wrongfully enjoined or restrained, which bond is still in full force and effect, and the Court being advised of the disastrous effect upon the community of a general strike or work stoppage by the defendants, it is

ADJUDGED and ORDERED that the execution of the judgment entered this day dissolving the temporary injunction be and the same hereby is suspended until the disposition of said appeal by the United States Court of Appeals for the Fourth Circuit, and during said period the said injunction heretofore granted shall remain in full force and effect.

Signed WALTER E. HOFFMAN,
United States District Judge

Norfolk, Virginia
February 8, 1957.

Letter from Defendants to Plaintiffs

November 25, 1955

"It is our understanding that plans are being made to change the reporting and relief point for certain yard crews from Port Norfolk to Berkley yard when Diesel power is put into service on the Belt Line.

"While we have received no formal notice of such change, the construction of new wash and locker room facilities at Berkley yard lends substance to the rumors being circulated about the property and convinces us that the changes are contemplated.

"Under these circumstances we think it proper that you be advised of the employees position concerning changes of this kind, so you will have the benefit of this information before the contemplated change becomes effective. It is for that purpose that this letter is being written.

"It is the employees position that through many years of custom, practice and acquiescence, Port Norfolk and Sewells Point have become firmly established as the two points where Norfolk & Portsmouth Belt Line crews can be required to report for and be relieved from duty. The employees of the Norfolk and Portsmouth Belt Line have established themselves in neighborhoods convenient to these established places of reporting and relief and it would be manifestly unfair for the company to deprive them of the benefits of such arrangements by arbitrarily creating an additional reporting and relief point for yard crews at Berkley yard.

"It is the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended."

Letter from Plaintiff to Defendants

February 10, 1956

"This will acknowledge letter dated November 25, 1955, signed by Mr. I. M. Barrick, General Chairman, Brotherhood of Locomotive Engineers; Mr. J. W. Hayes, General Chairman, Brotherhood of Railroad Trainmen; and Mr. C. W. Mathews, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, stating that it is your understanding that plans are being made to change the reporting and relief point for certain yard crews from Port Norfolk to Berkley Yard when diesel power is put into service on the Belt Line.

"Acknowledgment of this letter has been deferred pending the further development of this Company's plans in connection with its Dieselization Program.

"In order to possibly arrive at a bettter understanding of the matter, I requested our Mr. J. L. Jones, Trainmaster and Road Foreman of Engines, to arrange with you for conference in my office at 2:30 P.M. Friday, February 10, 1956, in order to discuss it. He advised me that you will be present.

"It should be distinctly understood, however, that this conference is not to be construed as being held for the purpose of negotiations in connection with the matter under consideration and will be held without prejudice regarding the positions of all concerned.

"No formal notice of any changes in the company's plans has been given to any organization representing its employees since such change in plans will depend on operating conditions and will be made in accordance with the provision of the current agreements with the various organizations representing this company's employees. Therefore, no formal notice of any changes in the company's program of operations is required.

"It is a fact that new wash and locker room facilities are being constructed adjacent to this company's yard

office in Berkley yard and will be ready for use in the near future.

"In regard to the employees' position relative to the change in reporting and relief point for its crews, this matter is completely covered in Schedule of Rates, Rules and Regulations effective December 1, 1941, as follows:

"ENGINEERS—ARTICLE VII—POINT FOR BEGINNING AND ENDING DAY

'(a) Provisions of existing rules that there shall be a specified point for either going on or off duty, or both, are not affected by anything herein; but schedules having no such rules shall be modified to provide that yard crews shall have a designated point for going on duty and a designated point for going off duty.

'(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that engine crews will report at the hump, others report at yard office, others at engine houses, or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will indicate a definite and recognized location.'

FIREMEN AND HOSTLERS—ARTICLE VII—POINT FOR BEGINNING AND ENDING DAY

'(a) Provisions of existing rules that there shall be a specified point for either going on or off duty, or both, are not affected by anything herein; but schedules having no such rules shall be modified to provide that yard crews shall have a designated point for going on duty and a designated point for going off duty.

'(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that engine crews will report at the hump, others report at yard office, others at engine houses, or ready tracks. It is not considered that the place to report will

be confined to any definite number of feet, but the designation will indicate a definite and recognized location.'

CONDUCTORS AND BRAKEMEN—ARTICLE VI—POINTS FOR BEGINNING AND ENDING DAY

'(a) Yard crews shall have a designated point for going on duty and a designated point for going off duty.

'(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location.'

"From the above, it will be noted that the point for going on and off duty will be governed by local conditions and that this point is not fixed as to specific location and does not necessarily have to remain the same for any specified period of time. It is, therefore, subject to change by the management of this company and is governed by local conditions which is determined by operating requirements at the management's discretion in accordance with the article referred to above.

"Changes governed by local conditions as a result of changed operating requirements and improved type of motive power determine the point at which crews should begin and end their days' assignment. The fact that Port Norfolk and Sewells Point have been designated as the two points where this company's crews report for and are relieved from duty does not restrict the company from designating an additional point or points governed by local conditions at which its crews shall report for and be relieved from duty.

"The management of this company does not desire to in any way work a hardship on its employees but it should be perfectly obvious that it can not restrict its operations by not increasing the number of points at

which its crews report for and are relieved from duty simply because some of its employees have established themselves in neighborhoods more convenient to the existing points for reporting to and being relieved from duty.

"This company does not agree with the statement that it is *manifestly unfair* for it to deprive its employees of the benefits which may be derived from their having established themselves in convenient neighborhoods nor has it *arbitrarily* created an additional reporting and relieving point for yard crews at Berkley yard since the article referred to above clearly sets forth the company's right to establish additional reporting and relief points.

"Relative to the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended.

"In view of the articles referred to above, there is no restriction placed on this company which prevents it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended.

"The articles referred to above are very specific in language and were intended for the purpose of permitting the company to change or add to the number of points at which its crews are to report and be relieved from duty, governed by local conditions."

Letter from Defendants to Plaintiff

February 13, 1956

"This will acknowledge your joint letter of February 10, 1956, which was in reply to ours of November 25, 1955,

concerning the company's plans to change the place of reporting and relief for certain yard crews from Port Norfolk and Sewells Point to Berkley Yard when diesel power is put into service on the Belt Line.

"We have noted your position concerning this contemplated change, and particularly your position that under the provisions of Articles VII of the B. of L. E. and B. of L. F. & E. contracts and Article VI of the B. R. T. contract such change is 'governed by local conditions which is determined by operating requirements at the Managements' discretion.'

"We doubless erred in our previous letter when we referred to the contemplated change as simply a change in the *point* where crews are to report and be relieved. We should have called your attention to the fact that the change will amount to a change in both the *point* and the *locality* at which these drews have traditionally reported and been relieved.

"A careful reading of the rules you have referred to, reveals that they refer to 'points,' ie, definite positions, and 'localities,' ie, areas or regions. We concede that the Company has a right under these rules to designate the point within the area or region of Port Norfolk or Sewells Point Yards where the employees we represent will be required to report and be relieved, so long as such designation does not work a hardship upon them, or result in a hazardous situation. We deny, however, that the company has the right under these or any other rules to require these men to report and be relieved at Berkley Yard—a new locality far removed from Port Norfolk and Sewells Point, and of difficult access to the employees without the benefit of agreements negotiated in accordance with the terms of the Railway Labor Act. But regardless of the rules upon which you base your position or the language by which the contemplated change might be described, the effect is that of establishing a new crew terminal by transferring a portion of the functions now performed at Port Norfolk or Sewells Point to Berkley Yard, and we feel quite strongly that when the Company

undertakes to make such change in a manner other than by mutual consent, or in accordance with the provisions of Section 6 of the Railway Labor Act, they are undertaking to change the working conditions of their employees, as a class as embodied in agreements, which action we consider to be in direct violation of Section 2, Seventh of the Act.

"We think you will upon further consideration and a careful reading of the rules you are relying upon come to the conclusion that our position in this matter is sound. We earnestly hope you will bring yourself to that point of view. And we assure you that should you do so, you will have our fullest cooperation in reaching agreements which will be fair and equitable to both the Company and its employees."

Telegram from defendants to Mr. E. C. Thompson, Secretary, National Mediation Board, Washington, D. C., February 13, 1956.

"Serious situation existing on Norfolk Portsmouth Belt Line Railroad as the result of management arbitrarily moving the terminal from Port Norfolk to Berkley, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

Telegram from Mediation Board to Plaintiff

1956 Feb. 13 PM 5·12

"FOLLOWING WIRE RECEIVED DATE FROM CHIEF EXECUTIVE BLE, BLFE, BRT QUOTE SERIOUS SITUATION EXISTING ON NORFOLK AND PORTSMOUTH BELT LINE RAILROAD AS THE RESULT OF MANAGEMENT ARBITRARILY MOVING TERMINAL FROM PORT NORFOLK TO BERKLEY A DISTANCE OF APPROXIMATELY

SIX MILES WITHOUT NEGOTIATING WITH COMMITTEES REQUEST YOUR BOARD TAKE IMMEDIATE JURISDICTION AND NOTIFY CARRIER TO HOLD MATTER STATUS QUO PENDING MEDIATION PROCEEDINGS LETTER FOLLOWS UNQUOTE PLEASE WIRE STATEMENT.

Letter from Mediation Board to parties:

March 5, 1956

"Reference is made to exchange of correspondence in connection with application for mediation dated February 14, 1956 from the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen in a dispute between those Organizations and the Norfolk & Portsmouth Belt Line Railroad Company on the following subject:

> 'Carrier arbitrarily moving terminal from Port Norfolk to Berkley a distance of approximately six miles without negotiating with the committees.'

"As stated in our letter of February 17, 1956 to Messrs. Brown, Gilbert and Kennedy, with copy to Mr. White, we are informed by the Carrier that they have not moved the terminal from Port Norfolk to Berkley, Virginia as stated in the application. On the other hand the situation appears to be that the Carrier proposes to establish a new point for certain crews to go on and off duty at Berkley Yard in connection with the dieselization of the motive power of this Company.

"The file was considered by the Board in executive session on March 2, 1956, and it is the Board's opinion that there is no basis for docketing the application for mediation on the subject described therein.

"However, as you were advised in our letter of February 17th, the dispute has been given our corre-

spondence File C-2446 and Mediator Lohm will be in Norfolk tomorrow, March 6th, for the purpose of meeting the parties in an endeavor to work out some solution to this controversy."

Letter from Mediation Board to parties:

July 30, 1956
Case No. E-29

"Reference is made to our File No. E-29 which covers a dispute between the Norfolk & Portsmouth Belt Line Railroad Company, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen on the subject of proposed assignment of certain yard crews to commence their tour of duty at the Berkley Yard in the Norfolk switching area.

"This Board proffered its mediation services in this dispute on April 27, 1956 under the provisions of Section 5, First (b) of the Railway Labor Act, which states in part:

> '* * * * The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.'

"This proffer of mediation was made after the organizations named above had notified this Board that authority had been granted to withdraw the employees they represented from the carrier's service at 7 A.M., Wednesday, May 2, 1956.

"Mediation proceedings were conducted with the assistance of Mediator Robert Roadley and Board Member Edwards, ending on July 24, 1956. A tentative agreement was reached as the result of mediation by Board Member Edwards. This agreement having been executed for the organizations by Mr. J. W. Turner, Assistant Grand Chief Engineer, Brotherhood of Locomotive

Engineers, Mr. M. L. Mellett, Acting Vice President, Brotherhood of Locomotive Firemen and Enginemen, and Mr. W. T. Jenkins, Deputy President, Brotherhood of Railroad Trainmen, subject to acceptance and execution on the part of the carrier.

'We are now in receipt of the following letter from Mr. H. L. White, Jr., President and General Manager of the Norfolk & Portsmouth Belt Line Railroad Company dated July 25th in which the carrier rejects the Mediation Agreement and proposals. The letter reads as follows:

> 'Please refer to letter from Mr. Leverett Edwards to me of July 24, 1956, NMB Case E-29, in regard to Mediation Agreement and Proposal.
>
> 'In compliance with Mr. Edwards' request that I advise you concerning this Company's decision in regard to the Agreement, I wish to advise that after full consideration of this matter it is with a great deal of regret I must inform you that the Norfolk and Portsmouth Belt Line Railroad Company rejects the Mediation Agreement and Proposal.
>
> 'I am exceedingly sorry that this matter could not be satisfactorily settled, and personally and on behalf of the Management of this Company wish to thank you, your Honorable Board and capable staff of Mediators for the exceptionally fine efforts which were made to obtain an Agreement.'

"In view of this action of the Carrier, copies of the proposed agreement, executed by the organizations representatives and now held in escrow by the undersigned, are being destroyed in accordance with Board Member Edwards' letter to Messrs. Turner, Mellett and Jenkins of July 24, 1956.

"The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of

grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.

"The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3, Second of the Act, to consider and decide upon the differences between them.

"The National Mediation Board stands ready to render what further assistance may be necessary if the parties agree to this procedure. A prompt reply is requested.

By direction of the NATIONAL MEDIATION BOARD."